REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench.

WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

BY

RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,

AND

CRESSWELL CRESSWELL, OF THE INNER TEMPLE, ESQRS.

BARRISTERS AT LAW.

VOL. VIII.

Containing the Cases of EASTER, TRINITY, and MICHAELMAS Terms,
in the 9th Year of GEO. IV. 1828.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR SAUNDERS AND BENNING,

(SUCCESSORS TO J. BUTTERWORTH AND SON,)

43. FLEET-STREET.

1829.

JUDGES

OF THE

COURT OF KING's BENCH,

During the Period of these REPORTS.

CHARLES LORD TENTERDEN, C. J.

Sir JOHN BAYLEY, Knt.

Sir GEORGE SOWLEY HOLROYD, Knt.

Sir JOSEPH LITTLEDALE, Knt.

Sir JAMES PARKE, Knt.

ATTORNEY-GENERAL.

Sir JAMES SCARLETT, Knt.

Sir CHARLES WETHERALL, Knt.

SOLICITOR-GENERAL.

Sir NICHOLAS C. TINDAL, Knt.

A

TABLE

OF THE

NAMES OF THE CASES

REPORTED IN THIS VOLUME.

A

B

Capel

C

E

F

S

Southampton,

1828.

SPARKES against BELL.

Soon after the marriage the plaintiffs commenced an action against the two defendants for the recovery of the 100*l.* due, and arrested them both, whereupon they gave bail. The husband was soon afterwards arrested for another debt, and committed to prison, and he and his wife suffered judgment by default in the action brought by the plaintiffs, and afterwards a ca. sa. was issued, upon which the husband, then in custody, was charged in execution, and *Sarah Bell* was committed to the same prison. An order for her discharge was made by *Bayley* J., and the husband afterwards obtained his discharge as an insolvent debtor.

The affidavits in answer did not deny the allegations made by the plaintiffs, but shewed that the house was mortgaged, not, however, to the full value.

Archbold shewed cause and contended, that the application to discharge the order was too late, the husband having in the mean time obtained his discharge as an insolvent debtor. In the case of *Miles* v. *Williams et Ux.* (*a*), it was held that a debt contracted by the wife dum sola was discharged by the bankruptcy of the husband: this case is precisely analogous; the debt was

1828.

Thursday, April 24th.

WILDBOR *against* RAINFORTH and Another.

Where a pauper, who had been permitted to occupy a parish house, went away from home: Held, that the overseers might lawfully enter and resume possession, without giving any notice to quit, and were not bound to pursue the mode pointed out by the 59 G. 3. c. 12. s. 24.

TRESPASS for breaking and entering the plaintiff's house, making a disturbance there, and carrying away her goods and chattels; second count, for ejecting the plaintiff from her house; third, for taking her goods and chattels. Pleas, the general issue and several special pleas, alleging in substance that the goods and chattels in the declaration mentioned were the property of certain persons named in the pleas; that they were delivered to the plaintiff to be taken care of and re-delivered on request; that the plaintiff took such bad care of them that they were in danger of being lost or stolen, wherefore the defendants by the command of the owners entered the house, the outer door being open, and took them away. There were other pleas, alleging that the plaintiff refused to re-deliver the goods on request, wherefore the defendants took them. To some of these pleas the plaintiff replied de injuriâ, and traversed the property in the goods as laid in the

1828.

WILDSOR against RADFORTH.

merely an occupier by sufferance.] The statute, by implication, gave her a right to keep possession until the expiration of the notice.

Lord TENTERDEN C. J. The plaintiff was not tenant of the premises, but was allowed to occupy them by the parish officers. Her occupation was in fact theirs. The statute was not intended to take away a right which the owner of property had at common law to enter and take possession, if it could be done peaceably, but to provide an expeditious mode, whereby parish officers might obtain possession where it was obstinately withheld, and that they might not do that which had before been sometimes done, viz. might not turn occupiers out vi et armis, which led to further expense and litigation. Here the plaintiff had gone away, the defendants entered, resumed possession, and afterwards carried away the furniture which belonged to them.

---

at the charge of any parish for the habitation of the poor thereof, or who shall have unlawfully intruded himself or herself into any such house, &c. shall refuse or neglect to quit the same, and deliver up the possession thereof to the churchwardens and overseers of the poor of any such parish within one month after notice and demand in writing for that purpose,

1828.

WILDBOR against RAINFORTH.

All that they might lawfully do; there is not, therefore, any ground for objecting to the verdict.

BAYLEY J. The provisions of the statute are equally applicable whether the party has wrongfully intruded himself into the premises or has been suffered by the parish officers to occupy them. Now it never could have been intended in the former case that the officers should not be at liberty to resume possession, if that could be done without a breach of the peace; I am, therefore, of opinion that the statute does not apply to the present case, and that the defendants, having the soil and freehold of the house in question, had a right to enter and take possession when the plaintiff went from home.

Rule refused.

KEATES *against* WHIELDON.

Thursday, April 24th.

A promissory note for 11*l.*, payable to *A. B.* on demand, is a promissory note payable to bearer on demand, within the meaning of the *55 G. 3. c.* 184., and requires a stamp of two shillings.

ASSUMPSIT on a promissory note. Plea, general issue. At the trial before *Park* J. at the Spring assizes for the county of *Stafford* 1828, the note was produced, and appeared to be in the following form: "I *J. Whieldon* of *F.* do promise to pay to *J. Keates* the sum of eleven pounds ten shillings on demand, with lawful interest for the same," and it had affixed on it a stamp of one shilling and sixpence only. It was objected by the defendant's counsel that this was a note payable to the bearer on demand of a sum of money exceeding 10*l.*, but not exceeding 20*l.*, within the first class of promissory notes mentioned in the *55 G. 3. c.* 184.

1828.

KEATES against WHEELDON.

c. 184. *sched. part* 1., and, therefore, that it required a stamp of two shillings. On the other hand, it was insisted that the first division of that part of the schedule applied in terms only to such promissory notes as were capable of being re-issued by bankers, and that by the fourteenth and twenty-fourth sections, those must be notes payable to the bearer on demand; that this was a note payable to the *payee only*, and not to the bearer, and therefore that it did not come within that part of the schedule; and if so, it must be within the next class of promissory notes mentioned in the schedule, viz. promissory notes for the payment in any other manner than to the bearer on demand, but not exceeding two months *after date, or sixty days after sight*, of any sum of money exceeding *5l. 5s.*, and not exceeding 20*l.*, and therefore that the stamp of one shilling and sixpence affixed on this note was proper. The learned Judge was of opinion that it required a two-shilling stamp, and directed the plaintiff to be nonsuited, but reserved liberty to him to move to enter a verdict.

W. E. Taunton now moved, and re-urged the arguments used at the trial.

1828.

RICHMOND against SMITH.

loss. The Lord Chief Baron told the jury that the defendant was in the situation of a carrier, and could not get rid of his common-law liability unless by giving an express notice; and under that direction they found a verdict for the plaintiff.

Clarke now moved for a new trial, and contended that the Lord Chief Baron mis-directed the jury in stating that the defendant could only get rid of his liability by express notice. In *Burgess* v. *Clements* (*a*) it was held that a guest who desired to have a private room, in which he placed his goods, out of which they were stolen, had exonerated the inn-keeper. Here the goods but for the plaintiff's order would have been taken to his bed-room, where in all probability they would have been safe. But he chose to have them in the public room; it is, therefore, but reasonable that he, and not the landlord, should suffer by the loss that ensued.

Lord TENTERDEN C. J. I am of opinion that we ought not to grant a rule on the ground of the supposed mis-direction in this case. It appears that the plaintiff went to the defendant's inn as a guest, taking certain

1828.

PENNY against FOY.

before *R. Buncombe* became bankrupt, he executed an assignment of all his property, bonds, bills, &c. to certain persons upon certain trusts, and that the trustees accepted the assignment whereby the bond in the declaration mentioned, and all *R. Buncombe*'s beneficial interest therein, became vested in the trustees. Fourthly, that at the time of the commencement of the suit there was due to the plaintiffs upon the bond in the declaration mentioned 455*l.* for principal and interest, and that before the said *R. Buncombe* became bankrupt, to wit, on the 7th of *June* 1817, he, by his writing obligatory, became bound to the defendant in the penal sum of 300*l.*, subject to a condition, whereby (after reciting that certain premises of the defendant were charged with the payment of an annuity of 50*l.* to *Elizabeth Buncombe*, and which the defendant also engaged to pay, and that *R. Buncombe*, in consideration of 149*l.* to him paid by the defendant, had agreed to pay and discharge the said annuity to *E. Buncombe*, and to indemnify the defendant of and from the same,) it was declared that if *R. Buncombe* did well and truly pay the said annuity, and indemnify defendant from the same, then the bond should be void, otherwise, &c. Aver-

1828.

PENNY against FOX.

damage. But as the condition was for payment of the annuity the onus of proving payment was upon the plaintiffs. *Toussaint* v. *Martinnant and Another* (a) is an express authority, that where a bond is given to a surety, conditioned for payment of the money, the surety may sue upon it as soon as the condition is broken, although he has not been called upon to pay.

Rule refused.

(a) 2 T. R. 100.

Friday, April 25th.

MAUGHAM *against* HUBBARD and ROBINSON, Assignees of LANCASTER, a Bankrupt.

A witness called to prove the receipt of a sum of money, was shewn an acknowledgment of the receipt of such money signed by himself; and on seeing it said that he had no doubt he had

ASSUMPSIT for money had and received. Plea, not guilty. At the trial before Lord *Tenterden* C. J., at the *Middlesex* sittings after last term, it appeared that the action was brought to recover from the assignees of the bankrupt 20*l.* paid by the plaintiff to the bankrupt before his bankruptcy. The bankrupt being called as a witness on the part of the plaintiff stated, that he had

1828.

MAUGHAM *against* HUBBARD.

paper itself was not used as evidence of the receipt of the money, but only to enable the witness to refresh his memory; and when he said that he had no doubt he had received the money there was *sufficient* parol evidence to prove the payment.

BAYLEY J. Where a witness called to prove the execution of a deed sees his signature to the attestation, and says that he is, therefore, sure that he saw the party execute the deed, that is a sufficient proof of the execution of the deed, though the witness add that he has no recollection of the fact of the execution of the deed.

Rule refused.

Saturday, April 26th.

HENLEY *against* SOPER the Elder.

Debt lies on the decree of a colonial court made for payment of the balance due on a partnership account. One of the partners

DEBT on a judgment of the supreme court of judicature in *Newfoundland*, whereby the plaintiff recovered a debt of 608*l.* 2*d.*, with costs of suit, which were taxed at 56*l.* 9*s.* 11*d.* Count for interest. Plea, nil debet. At the trial before *Gaselee* J. at the last

1828.

HENLEY against SOPER.

the authority of *J. Soper* junior to appear and act as agent for his father in the supreme court, a letter was given in evidence written by the defendant to the plaintiff on the 9th of *April* 1821, wherein he stated that he was determined on dissolving his connection with the plaintiff, and in order to facilitate that object, had given his son a power of attorney to act on his behalf, with authority to appoint any other person as he might see fit. And also a petition from the defendant to the supreme court, dated the 30th *November* 1825, praying for further time to produce his accounts before the arbitrators. For the defendant it was contended that the proceeding in the supreme court was in the nature of a bill in equity for an account of partnership transactions, and that the money awarded was for a demand which could not be sued for in the courts of law in this country, therefore no action was maintainable on the judgment; secondly, that the authority given to the defendant's son did not warrant a submission to arbitration; and, thirdly, that the second reference did not appear to be made with the assent even of *Soper* junior. The learned Judge directed the jury to find for the plaintiff for the amount of the foreign judgment, together

1828.

HENLEY against SOPER.

of a court of law, in the former there is, to prevent a failure of justice. There is another difference, also: in considering the proceedings of a colonial court we must look at the substance and not at the form, according to the rule adopted by the privy council. If we, sitting in *England*, were to require in the proceedings of foreign courts all the accuracy for which we look in our own, hardly any of their judgments could stand. With respect to *Carpenter* v. *Thornton*, I think it does not establish the broad principle for which it was cited. It appears by the report that I then expressed myself with much caution, and I do not find that I ever said that a decree of a court of equity, fixing the balance due on a partnership account, could not be enforced in a court of law, unless the items of the account could be sued for. My judgment proceeded on the particular circumstances of that case: the bill was for the specific performance of an agreement, which is a matter entirely of equitable jurisdiction. But it is a general rule, that if a partnership account be settled, and a balance struck by due authority, that balance may be recovered in an action at law. In the present case, the first step appears to have been taken by the plaintiff to procure an adjustment of the partnership accounts. The defendant's son, acting

1828.

HENLEY *against* SOPER.

equity if duly perfected. Here the decree was perfected.

LITTLEDALE J. I am entirely of the same opinion as to the sum decreed to be paid as the balance of the partnership account, nor do I see any objection to the demand of the other two sums for costs and interest.

Rule refused.

Monday, April 28th.

DOE on the demise of OLDHAM and Wife *against* WOLLEY.

A will more than thirty years old may be read in evidence, without proof of its execution, although the testator has died within thirty years, and some of the subscribing witnesses are proved to be still living. After the lapse of a period of more than 100

EJECTMENT for lands in *Worcestershire*. Plea, the general issue. At the trial before *Vaughan* B., at the last Spring assizes for *Worcester*, it appeared that the lessors of the plaintiff claimed as devisees of *Frances Wolley*, who was said to be heir of *T. Wolley*, who died in 1800, seised of the estate in question, having devised it to his widow for life, remainder to his right heirs. This will was dated the 21st *February* 1798, more than thirty years before the trial, but one of the subscribing witnesses was proved to be still living;

1828.

Doe dem. Oldham against Wolley.

Wolley's grandfather died without issue. *Doe* v. *Griffin* (*a*) goes further than any former case: there it was proved that a person went abroad and died there, and that none of his family ever heard that he was married, and it was held that he might be presumed to have died without issue; but there the party having died abroad, other evidence could hardly be expected, and that was contrary to the case of *Richards* v. *Richards*, cited in a note to the report.

Lord Tenterden C. J. As to the first point I am of opinion that the rule of computing the thirty years from the date of a deed is equally applicable to a will. The principle upon which deeds after that period are received in evidence, without proof of the execution, is, that the witnesses may be presumed to have died. But it was urged that when the existence of an attesting witness is proved, he must be called. That, however, would only be a trap for a nonsuit. The party producing the will might know nothing of the existence of the witness until the time of the trial. The defendant might have ascertained it, and kept his knowledge a secret up to that time, in order to defeat the claimant.

1828.

Doe dem. Watson against Fletcher.

sole and only purpose that Lord *Sondes* might be enabled to present thereto either *Henry Watson* or *Richard Watson* (his brothers), when such of them as should be so presented should be capable of taking an ecclesiastical benefice," was, that *Fletcher* should, upon the request of Lord *Sondes*, resign the rectory and parish church of *Kettering*, with the appurtenances, in order that he, Lord *Sondes*, might present to the said rectory either *Henry Watson* or *Richard Watson*, when such of them as was to be so presented should be capable of taking an ecclesiastical benefice. This bond was held by the House of Lords, in 1826, to be void (*a*). The King, on the 26th of *July* 1827, presented *H. Watson*, the lessor of the plaintiff, to the rectory; and he, notwithstanding impediments, read himself in so as to comply with the statutes 13 & 14 *Car.* 2. *c.* 6. *s.* 1. It was contended that the action of ejectment was not maintainable, and that the plaintiff ought to have proceeded by quare impedit. The learned Judge overruled the objection, and a verdict was found for the plaintiff; but liberty was reserved to the defendant to move to enter a nonsuit.

[redacted]

1828.

Doe dem. WATSON *against* FLETCHER.

therefore put into corporeal possession of the church, with the rights thereto belonging, and ejectment therefore was maintainable. Quare impedit is the proper remedy where the church is full; but here the church was void, because the presentation, institution, and induction of Mr. *Fletcher* having been made in consideration of the resignation bond which was simoniacal, were void by the statute 31 *Eliz. c.* 6., and the right for that turn belonged to the King. The church, therefore, was not full at the time when the lessor of the plaintiff was presented.

Rule refused (*a*).

(*a*) See *Winchcombe* v. *The Bishop of Winchester*, *Hob.* 165.

The KING *against* The Inhabitants of ASHLEY HAY.

Wednesday, April 30th.

Since the statute 6 *G.* 4. *c.* 57. in order to gain a settlement by settling upon a tenement, the reserved rent for one whole year (whatever be its amount) must be paid.

UPON appeal against an order of two justices for the removal of *J. Sneap*, his wife and children, from the township of *Ashley Hay*, in the county of *Derby*, to the township of *Mugginton*, in the same county; the sessions quashed the order, subject to the opinion of this Court on the following case: —

At *Lady-day* 1825, the pauper, *J. Sneap*, being legally settled in *Mugginton*, hired a farm in *Ashley Hay* by the year, at the rent of 54*l.* per annum, payable half-yearly. He held and resided upon the said farm for more than twelve months, and he paid rent on account of the same to the amount of 40*l.*, but he did not pay a whole year's rent for the same prior to his becoming chargeable to and his being removed by *Ashley Hay* township. He

was,

1828.

The KING against The Inhabitants of ASHLEY HAY.

was, prior to the 22d of *June* 1825, charged in respect of the farm in two assessments for the relief of the poor, and with the public taxes of *Ashley Hay* township, and applications were made to him for payment of such taxes prior to the said 22d of *June* 1825, but he did not pay the same till after the 10th of *July* 1825.

N. R. Clarke in support of the order of sessions. The pauper gained a settlement in *Ashley Hay* by reason of his having rented a tenement at an annual rent exceeding the value of 10*l.*, and having paid more than 10*l.* on account of one year's rent. The question raised by this case (which was reserved by the sessions before *Rex* v. *Ramsgate* (*a*) was published) is, whether the statute 6 *G.* 4. *c.* 57. requires that the whole year's rent should be paid, or rent to the amount of 10*l.* only. It must be conceded that in *Rex* v. *Ramsgate* it was decided by this Court that since the 6 *G.* 4. no settlement could be gained by settling upon a tenement, unless the entire rent reserved for the term of one whole year (whatever be its amount) be actually paid. Such a construction of the statute, however, makes the words "for the term of one year at least" wholly inoperative; and this in-

1828.

The King against The Inhabitants of Birmingham.

appellants then offered evidence to prove that at the time of said marriage *Elizabeth Smith*, then *Elizabeth Bratt*, was settled in and chargeable to the parish of *Little Packington*, and that the marriage was effected and brought about by a fraudulent contrivance and conspiracy of the overseers of the parish of *Little Packington*, for the purpose of changing the settlement of *Elizabeth Smith*, then *Elizabeth Bratt*, from the parish of *Little Packington* to the parish of *Birmingham*, in which *Luke Smith* was then settled. The court of quarter sessions refused to admit the evidence, and confirmed the order of removal, subject to the opinion of the Court of King's Bench, first, upon the validity of this marriage within the provisions of the statute 4 *G.* 4. *c.* 76.; secondly, upon the propriety of the rejection of the above-mentioned evidence.

Amos and *Hill* in support of the order of sessions. This question depends upon the last marriage-act, 4 *G.* 4. *c.* 76., and that does not make the consent of parents requisite to the validity of a marriage by licence, although the parties may not be of age. By the 26 *G.* 2. *c.* 33. *s.* 11. such consent was made essential to the validity of

1828.

The King *against* The Inhabitants of BIRMINGHAM.

provisions of the latter statute, and the former enactments may be altogether laid out of consideration. By the sixteenth section it was enacted, "That the father, if living, of any party under twenty-one years of age (such party not being a widower or widow), or if the father shall be dead, the guardian or guardians, &c. shall have authority to give consent to the marriage of such party; and such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorized to give such consent." It will be argued, that as the law requires the consent of the father, if it be not given, the marriage is void. But throughout the marriage-act there is a great difference between an objection that avoids a marriage and one which makes it the duty of the clergyman not to proceed with the marriage if it be known to him. In section 22. certain cases are specified in which the marriage shall be null and void to all intents; but the case of a marriage without consent of parents, &c. is not mentioned. Again, in section 23. it is enacted, "that if any *valid* marriage, solemnized by license, shall after, &c. be procured by a party to such marriage to be solemnized between persons one or both of whom shall be under the age of twenty-one years, contrary to the provisions of this act, by means of such party falsely swearing to any matter to which such party is hereinbefore required personally to swear, &c. such party shall forfeit all property accruing from the marriage." And the statute then goes on to provide, that it shall be secured under the direction of the Court of Chancery or Exchequer, for the benefit of the innocent party or the issue of the marriage. The legislature, therefore, clearly contemplated that valid marriages might be celebrated without proper consent;

and

1828.

The KING *against* The Inhabitants of BIRMINGHAM.

and this is also manifest from the provision made for the issue. If the marriage were void, the issue would be illegitimate, and it is not probable that the act would have contained a provision in their favour. As to the second point, it is clear that the justices did right in rejecting the evidence of fraud; for although a marriage be brought about by means of the fraudulent practices of overseers, it is not on that account void, *Rex* v. *Watson* (*a*), *Rex* v. *Tarant* (*b*).

Goulburn and *Waddington* contrà. Mr. *Nolan* in his treatise lays it down as a general rule that no settlement can be legal which is brought about by practice or compulsion (*c*). [Lord *Tenterden* C. J. Does the rule go further than this, that the Court will prevent a fraud from having its effect when that can be done without violating some higher and more important rule?—*Bayley* J. Mr. *Nolan* treats the case of marriage as an exception from the general rule before mentioned, p. 290. n. 2. and 292. n. 7.] Then as to the first and principal question, by the 26 *G.* 2. *c.* 33. *s.* 11. it was expressly enacted, that the marriage of a minor, solemnized by license, obtained without the requisite consent of parent or guardian, should be null and void

1823.

The King against The Inhabitants of Birmingham.

On the following morning the judgment of the Court was delivered by

Lord TENTERDEN C. J. We have considered the various statutes referred to by counsel, and are all of opinion that the marriage in question is valid. A marriage under such circumstances would by the 26 *G.* 2. *c.* 33. *s.* 11. have been void, but the 3 *G.* 4. *c.* 75. *s.* 1. recites that section, and that it had been productive of great evils and injustice, and then proceeds to enact, "that so much of the said statute as is hereinbefore recited, as far as the same relates to any marriage to be hereafter solemnized, shall be and the same is hereby repealed." The second section enacted, that marriages theretofore solemnized by license, without such consent as required by the former act, should be valid, with certain limitations imposed by the third and four following sections. Then the eighth and subsequent sections contained new provisions as to granting licenses in future. These were repealed by the 4 *G.* 4. *c.* 17., which restored certain parts of the 26 *G.* 2. *c.* 33., and some question might be raised as to whether that part of the 3 *G.* 4. *c.* 76. remained in force which repealed the 11th section of the 26 *G.* 2. But that question is now rendered im-

1828.

Friday, May 2d.

R. B. BURLEIGH and Others, Executors and Executrix of ROBERT BURLEIGH, deceased, *against* E. STOTT, Administratrix of T. STOTT, deceased.

To an action upon a joint and several promissory note of *A.* and *B*, the latter being a mere surety, brought by payee against the administrator of *B.*, the defendant pleaded that the cause of action did not accrue within six years, upon which the plaintiff took issue. The plaintiff proved, that within six years, and during the lifetime of *B.*, *A.* made a payment on account of the note. *B.* afterwards died; Held, that such

ASSUMPSIT on a promissory note made by *T. Stott*, the intestate, dated 4th *March* 1818, for 600*l.*, payable to *Robert Burleigh*, with interest. Common money counts. Plea, first, the general issue, upon which issue was joined; secondly, the statute of limitations. The plaintiffs replied, a writ issued on the 3d of *October* 1826, by the plaintiffs as executors against the defendant as administratrix. Rejoinder, admitting the writ, but alleging that the causes of action did not accrue within six years of the issuing of the same, upon which issue was joined. At the trial before Lord *Tenterden* C. J., at the *London* sittings before *Michaelmas* term 1827, a verdict was found for the plaintiffs for 625*l.*, subject to the opinion of this Court on the following case: On the 4th *March* 1818, *Thomas Burleigh* and *Thomas Stott* signed the following promissory note:

1828.

Bullerdin against Stott.

ledgment of one out of several makers of a joint and several promissory note was holden sufficient to take it out of the statute of limitations as against the others, and that upon the ground that payment by one was payment by all; that the one acted virtually as agent for the rest, and that an admission by one was an admission by all, and that the law raised a promise to pay when the debt was admitted to be due. And in *Perham* v. *Raynal* (*a*) it was held, that an acknowledgment within six years by one of two joint makers of a promissory note revived the debt against the other, although that other had made no acknowledgment, and only signed the note as a surety. In *Atkins* v. *Tredgold* (*b*) the payment was made after the death of one of the promisors, and the other was liable as survivor. It was a payment made by him in his own right and on his own account, and not on account of or as agent for *A*. But in this case the payment was made during the life of *T. Stott*, and he, by signing, had made his co-promisor his agent for the purpose of making any payments on the note, and the latter executed the authority by making the several payments. The intestate was bound by those payments in the same way as he would have been if he had made

1828.

BURLINGH against STOTT.

promise to pay within the six years. But I think that in this case there was sufficient evidence of a promise by the intestate within six years to pay jointly and severally according to the form of this note. Suppose the note had been joint only, there could not have been any doubt that a part-payment by one of the joint promisors would refer to the nature of the note, and operate as an admission by all the joint promisors that the note was unsatisfied, and therefore as a promise by all to pay the residue. Here the note is joint and several, and the plaintiffs are bound to sue as if it was the several note of the intestate, because *Stott*, one of the joint promisors, is dead. It is said that it must be considered as if there were three notes, one joint and two several notes, and that the payment by one only operates as an admission so far only as the joint promise is concerned, and no further, and, consequently, that the joint promise being at an end by the death of one of the copromisors, the action is not maintainable. If we were so to hold, I think we should put the law on too nice a distinction. I am of opinion, that a part-payment by one is an admission by both that the note is unsatisfied, and that it operates as a promise by both to pay according to the

1828.

Saturday, May 3d.

The Dock Company at KINGSTON-UPON-HULL *against* LA MARCHE.

By an act of parliament, certain persons were incorporated as the *Hull* Dock Company, and premises (before the property of the crown) were given to them for the purposes of the act, and they were authorised to make a dock, quays, wharfs, &c., which, it was enacted, should be vested in them for the purposes of the act. Amongst other things, it was provided, that "all goods, &c. which should be *landed or discharged* upon any of the quays or

THIS was an action of indebitatus assumpsit for wharfage, with the usual money counts. Plea, the general issue. At the trial before *Bayley* J., at the Spring assizes for the county of *York*, 1827, a verdict was found for the plaintiffs, damages 7*l.* 5*s.* 3*d.*, subject to the opinion of this court on the following case: —

The plaintiffs were the dock company of *Kingston-upon-Hull*, who were incorporated under an act of parliament passed in the 14 *G.* 3. By the fifteenth section they were authorized within seven years to make a dock, and a quay or wharf, of a sufficient and convenient length, for the trade and business of the said town and port, which should range along the side of the dock next the town; which quay or wharf should be deemed and taken to be a legal quay or wharf for the landing and discharging, lading and shipping, of any goods, wares, and merchandize. By section 18., after reciting that in

1828.

The Kingston-upon-Hull Dock Company against La Marche.

and chargeable with the like rates of wharfage and payments as are usually taken or received for any goods, wares, or merchandize *loaded or discharged* upon any quay or wharfs in the port of *London*, and shall be paid to the respective company and owners of the said quays or wharfs so to be erected as aforesaid, in like manner as the rates and duties established by this act are hereby directed to be paid." By a previous section (42.) it was provided as follows: "And be it further enacted, by the authority aforesaid, that in consideration of the great charges and expenses which by the making, building, erecting, and providing such basin or dock, quay or wharf, reservoirs, sluices, bridges, roads, and works, and the supporting, maintaining, and keeping the same in repair for the future will amount unto, there shall be payable, and paid from and after the said 31st day of *December* 1774 to the said company, or to their collectors or deputies for their use, for every ship or vessel (the King's ships of war and other ships and vessels employed in his Majesty's service only excepted) coming into or going out of the said harbour, basin, or docks within the port of *Kingston-upon-Hull*, or unlading or putting on shore, or lading or taking on board any of

1828.

The KINGSTON-UPON-HULL Dock Company *against* LA MARCHE.

entry inwards, or clearance or discharge outwards; or in case any ships or vessels shall not enter as aforesaid, then at any time before such ships or vessels shall proceed from the said port, at the custom-house in the said port; so as no ship or vessel shall be subject or liable to the payment of the said rates or duties, or any of them, more than once for the same voyage both out and home, notwithstanding such ship or vessel may go out and return with a loading of goods or merchandize." And by the 42 *G.* 3., by which a new basin was authorized to be made, it was provided as follows: "And be it further enacted, that all goods, wares, and merchandize, which shall be *landed or discharged* on any of the wharfs which shall be made and built on the east and west sides, or north and south ends of the basin or dock, and entrance hereby directed to be made, shall be liable to pay, and shall be charged and chargeable with the like rates of wharfage and payments to the said dock company as are or may be taken or received by them for any goods, wares, or merchandize *loaded or discharged* upon the quays or wharfs of the basin or dock made in pursuance of the said recited act; and that the said dock company shall have and be entitled to the like powers and remedies for the recovery thereof as are given by the said recited act for the recovery of the rates and duties thereby granted." Besides the quays or wharfs erected by the dock company under the different powers given by the 14 *G.* 3., there were also, in the town and port of *Hull*, certain other quays or wharfs the property of different individuals, which quays or wharfs were erected pursuant to certain provisions in the third section of that act. By that section it was provided as follows: "And whereas there are certain

staiths

1828.

The Kingston-upon-Hull Dock Company against Le Marchant.

staiths situate on the west side of the river *Hull* between *T. W.*'s ship-yard and a certain staith called *Rotten Herring Staith*, at which staiths the proprietors thereof have from time immemorial landed and discharged, laden and shipped goods, wares, and merchandize; and whereas it is reasonable that this privilege should be continued to the proprietors of the staiths, be it therefore further enacted, by the authority aforesaid, that when and as soon as the basin or dock hereinafter mentioned and directed to be made shall be fit for the reception of loaded ships, and not sooner, it shall be lawful for all and every the proprietors of the said staiths to build and make at their own expense and charge commodious quays or wharfs opposite to their said staiths respectively, to be erected upon piles of wood, and not otherwise, and to project into the haven of the said river *Hull* fifteen feet, to be open at all times to the officers of his Majesty's revenue by a free and clear communication with the common staiths adjoining; on which quays or wharfs, when so made and erected, it shall be lawful to ship off, land, and discharge all goods called sufferance goods, that is to say, hemp, iron, flax, yarn, timber, raff, and all other goods and

1826.

The Kingston-upon-Hull Dock Company against La Marche.

cranage and wharfage of their goods as aforesaid, it is further ordered, that this order and table of rates be published in the *London Gazette*, and that a copy of the said table of rates shall, according to the direction of the aforesaid act of parliament, be kept constantly hanging up in the most public part and place of each and every of the said wharfs or quays, and another at the Custom House, for all persons concerned to resort unto, and make use of as they shall have occasion.

The case was argued on a former day in this term by *Alderson* for the plaintiffs. There are two questions in this case; first, whether the act is really ambiguous; and, secondly, whether that ambiguity is to operate against the claim of the plaintiffs, or against the restriction of their general right; and that will depend upon whether at common law they would be entitled to wharfage for goods shipped off from their quays as well as for those landed on them. If their rights are founded altogether upon the act of parliament, the ambiguity must operate against them, according to the principle laid down in two modern cases, *Waterhouse v. Keen* (a), which was a claim of toll on a public road, and *Denn d.*

1826.

The Kingston-upon-Hull Dock Company against La Marche.

shipping or landing goods, will be deprived of that privilege. The 14 *G.* 3. *c.* 56. *s.* 3. recites, that there were certain staiths at which the proprietors had from time immemorial landed and discharged, laden and shipped, goods, and then gives the owners power to erect quays in lieu of them; *s.* 13. vests other staiths in the corporation, and gives them power to erect quays in lieu of them in the same manner as it was given to the other proprietors by *s.* 3.; and *s.* 45. provides, that for all goods, &c. which shall be landed or discharged upon any of the quays or wharfs which shall be erected by virtue of this act, the same dues shall be taken as for goods loaded or discharged in *London*. That applies equally to all quays, whether the property of the company or individuals, and, therefore, has the effect of controlling pre-existing rights, consequently it should not be construed so as to narrow and restrain them, unless the intention of the legislature so to do is quite apparent. The word *landed* is entirely without effect, and the idea that it was inserted by mistake for *loaded* is confirmed by the subsequent act 42 *G.* 3., which authorizes the company to take for the use of the new quays and wharfs the like dues as might be taken for

1828.

The Kingston-upon-Hull Dock Company against La Marche.

first, we think that under the statute in question the plaintiffs cannot claim any thing that is not expressly given. It contains several recitals, and in particular that it is expedient that lawful quays should be established at the port of *Kingston-upon-Hull* for the shipping and landing of goods imported there, and exported from thence, in such manner as thereinafter expressed. It then gives the owners of private staiths, and to the corporation of *Hull*, certain powers as to substituting quays for old staiths. It then enacts, that the mayor and burgesses of *Hull*, and certain other persons, shall be a corporation; and after reciting that his Majesty had consented to give them certain premises for the purposes of the act, it vests those premises in the Dock Company, "to be applied to the uses and purposes mentioned in the act, and no other;" and section 25. vests in them all quays, &c. made in pursuance of the act, except those substituted for staiths. A sum of money was given to them out of the revenues of customs, and other money was raised amongst themselves; and by section 42., in consideration of the expense of making and maintaining the dock, certain tonnage duties on shipping were given; and by section 45. the company

[redacted]

1828.

The KINGSTON-UPON-HULL Dock Company against LA MARCHE.

right to wharfage dues both ways; and, at all events, they are now in as good a situation as the Dock Company. For these reasons, we think that our judgment must be for the defendant.

Postea to the defendant.

Saturday, May 3d.

The KING *against* The LONDON Gas-Light and Coke Company.

The 7 *G.* 3. c. 37. which enacts, that certain lands to be embanked from the river *Thames* shall be "free from all taxes and assessments whatsoever," exempts the occupiers of premises built on those lands from payment of poor-rates in respect of such occupation.

UPON appeal against a rate made for the relief of the poor of the parish of *St. Bride's, London*, the sessions confirmed the rate, subject to the opinion of this Court on the following case: By a certain rate or assessment, being the rate or assessment appealed against, duly made and allowed by two justices of the peace for the city of *London*, on the 22d of *September* 1826, on the several inhabitants and others, and every occupier of lands, houses, shops, warehouses, and other tenements or hereditaments within the parish of *St. Bridget*, otherwise *St. Bride*, in the ward of *Farringdon*

1828.

The KING *against* The LONDON Gas Light Co.

£1200.	The City of *London* Gas Light and Coke Company for houses, sheds, and premises, *Daniel Benham*, secretary, resident, - -	£90	0	0
£12.	The City of *London* Gas Light and Coke Company for houses and premises, *Daniel Benham*, -	£0	18	0
£24.	The City of *London* Gas Light and Coke Company for houses and premises, *Daniel Benham*, -	£1	16	0

The premises for which the company is rated and charged in the said assessment at the sum of 90*l.*, upon the annual rental or value of 1200*l.*, consist of a wharf, buildings, and premises abutting on the river *Thames*, near *Blackfriars Bridge*, held by the company under a lease granted by the New River Company, a part of which premises is in the said parish of *St. Bridget*, otherwise *St. Bride*, and liable to be rated thereto at the sum of 60*l.*, upon the annual rental or value of 800*l.*, and the remaining parts of such buildings, together with the wharf and premises, covering and comprizing a space of 22,642 feet, superficial measure, which are assessed in the said rate, upon the annual rental or value of 400*l.*, and which the *London* Gas Light and Coke Company claim to be exempted from the said rate, are built upon ground and soil which were formerly part of the ground and soil of the river *Thames*, and were enclosed and embanked by the New River Company, and became vested in the City of *London* Gas Light and Coke Company as lessees for a term, yet unexpired, of the adjoining wharf and ground in front of which the

1828.

The King against The London Gas Light Co.

said ground and soil of the said river were so inclosed and embanked. The inclosure and embankment were made by the New River Company under the act 7 *G.* 3. *c.* 37., by which (after reciting that it would tend to remove many inconveniences if the ground and soil of the river *Thames* between certain limits, including the land in question, was inclosed and embanked,) it was enacted, that it should and might be lawful for the mayor, aldermen, and commons, in common-council assembled, to inclose and embank the said ground. By the second section the owners of wharfs abutting on this ground were authorized to inclose that part of it opposite their premises at their own expence, giving certain notices to the town-clerk of the city; and by the 51st section it was enacted, that the ground and soil of the said river so to be inclosed and embanked in the front of every such wharf, should vest in the owner of such adjoining wharf, *free from all taxes and assessments whatsoever*. By the 52d section certain quit-rents were imposed upon the land so to be inclosed; and a quit-rent, amounting to 28*l.* 11*s.* 8½*d.* per annum, payable by virtue of the act for the land in question, was redeemed by the New River Company, in the year 1769, for the

[redacted]

1828.

The King against The London Gas Light Co.

warehouse, coach-house, stable, cellar, vault, or any other building, tenement, or hereditament within the said parish, and on every other person and persons who by law was, were, or should be chargeable or liable to be assessed for or towards the relief of the poor." In the 7 *G.* 4. an act to amend this act was passed, but the 35th section, relating to the poor-rates, was the same as in the former statute.

The New River Company, whilst in possession of the ground and soil for which the exemption is now claimed by the *London* Gas Light and Coke Company, were several years regularly rated to the poor-rate of the parish of *St. Bridget*, otherwise *St. Bride*, in respect of the same, and of the buildings erected thereon, and paid their rates until 1825, when a new and higher assessment having been made, they objected to the rate, and claimed a total exemption. The question for the opinion of this Court was, Whether the said land, comprizing the said space of 22,642 superficial feet, the said wharf and premises, and the said buildings erected thereon, and which are assessed in the said rate upon the annual rental or value of 400*l.*, are liable to be rated to the relief of the poor of the said parish of *St. Bridget*, otherwise *St. Bride?* If the Court should determine that the said last-mentioned wharf and premises, and the said buildings erected thereon, are liable by law to be rated to the relief of the poor of the said parish, the said rate is to be confirmed; but if they should be of opinion that the said last-mentioned premises are not liable to be so rated, the said rate is to be confirmed as to the sum of 60*l.* upon the annual rental or value of 800*l.*, and to be amended by striking out of the said rate the annual rental or value of 1200*l.*, and inserting

1828.

The King against The Lennox Gas Light Co.

inserting instead thereof 800*l.*, and by striking out the sum of 90*l.* so assessed as aforesaid, and inserting instead thereof the sum of 60*l.*

Brodrick in support of the order of sessions. The Gas Light Company are rateable to the relief of the poor in respect of their occupation of the premises erected on the land embanked under the authority of the 7 G. 3. c. 37. The exemption which they claim rests upon the fifty-first section of that statute, which provided that the land embanked should be free from all *taxes and assessments*. Those words have never hitherto been considered as including poor-rates, for the occupiers of the land have always, from the time when it was embanked up to the time when the rate in question was made, paid the rate without dispute. And this is the more remarkable as several questions have at different times been raised as to the construction of the exemption. Thus, in *Williams* v. *Pritchard* (*a*) it was held that the land was exempt from land-tax: but the land-tax is imposed in a gross sum upon the district, and then subdivided amongst the different land-owners in that district; and whether a particular spot be exempted from pay-

1828.

The KING against The LONDON Gas Light Co.

imposing the rates provided that the amount to be paid by each occupier should be in proportion to the land-tax; premises exempt from the one were, therefore, necessarily held to be exempt from the other also. Then came the case of *Perchard* v. *Heywood* (*a*), where the Court held premises embanked under the 7 G. 3. liable to the house and window tax. It is true that in the statute imposing the tax there were strong words extending the liability to all premises not expressly exempted by that act; but Lord *Kenyon* said that without them he should have been of the same opinion. The only case, therefore, against the present rate is that respecting the land-tax; but it is distinguishable, that tax was imposed on the land, and the stat. 7 *G.* 3. *c.* 37. declares that this land shall be exempt from taxes; the poor-rate is imposed not on the land, but on the party in respect of his occupation of the premises; and a statute in its nature private, giving an exemption from a general burden attaching by law upon all persons, should be construed strictly. The local acts obtained by this parish in the 39 G. 3. and 7 G. 4. for the better governing of the poor are, at all events, inconsistent with the existence of the exemption now claimed. They say that all inhabitants and occupiers shall be rated by an equal pound-rate, and are therefore at variance with the former act, if that gave the exemption. Now, according to the rule laid down in *Forster's* case (*b*), these subsequent statutes being in the affirmative abrogate so much of the older statute as is inconsistent with them, and make the defendants liable to be rated for the property in question.

(*a*) 8 *T. R.* 486.

(*b*) 11 *Co.* 62.

Bolland,

1828.

The King against The London Gas Light Co.

Bolland, contrà, was stopped by the Court.

Lord TENTERDEN C. J. The question in this case is, Whether certain property built on land embanked in pursuance of the statute 7 *G.* 3. *c.* 37. is to be exempt from poor-rates? That act contemplated an undertaking likely to be productive of public benefit, and certain inducements were held forth to the city to carry it into execution, and it provided, that the land so embanked should vest in certain persons "free from all taxes and assessments whatsoever," and the question is, Whether by those words the land is exempt from poor-rates? It has already been decided that it is exempt from the land-tax, and I know not upon what principle that decision could proceed, if it be not exempt from poor-rates also. It is said that an aggregate sum was imposed upon the district for land-tax, which was afterwards subdivided amongst the individuals having property there; and that it was immaterial to government how the division was made, provided the whole sum was raised. It was also said, that the act of parliament being in its nature private must be considered as a bargain between those who were parties to it, and that the city at large

[redacted]

1826.

The King against The Lowmen Gas Light Co.

these reasons I think that the premises in question are exempt from poor-rate, and that the rate must be amended.

BAYLEY J. I am of the same opinion. The cases cited by my Lord *Tenterden* are in point. Besides, the house and window tax was a new one imposed after the exemption was given; and the exemption may be considered analogous to a covenant to pay taxes which applies to old taxes or others substituted for them, but not to taxes entirely new, unless there are express words to give it such extensive operation.

HOLROYD J. concurred.

Rate to be amended.

Tuesday, May 6th.

DONNE *against* MARTYR.

A local act for enlarging, cleansing, paving, and lighting the streets, &c. in the city of London, au-

DEBT to recover a penalty of 50*l.* imposed by the 11 *G.* 3. *c.* 29. from the defendant, alleged to be a substantial inhabitant of the ward of *Coleman Street*, for not taking the oath required by the statute as collector

1828.

DONNE against MARTYR.

lighting the streets, and making, enlarging, &c. the common sewers within the city of *London* for the year ending 21st *December* 1825. The declaration contained a count framed on a refusal to take the office. Plea, not guilty. At the trial before Lord *Tenterden* C. J. at the *London* sittings before *Michaelmas* term, a verdict was found for one penalty of 50*l.*, subject to the opinion of this court on the following case:—

By the statute 11 *G.* 3. *c.* 29., entitled an act for consolidating and rendering more effectual the powers granted by several acts of parliament for making, enlarging, amending, and cleansing the vaults, drains, and sewers within the city of *London*, and liberties thereof, and for paving, cleansing, and lighting the streets, &c., and preventing and removing obstructions within the same, it is enacted, "That for the defraying the expense of paving, cleansing, and lighting the said streets, &c., and preventing annoyances therein, and of making, enlarging, &c. the common sewers, &c. within the city, one or more rates or assessments should (when the commissioners appointed by that act should think fit to order) be made, laid, and assessed in the several wards of the said city, by the aldermen or their deputies respectively, and the major part of the common councilmen of each ward, upon all and every person and persons who did or should inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, cellar, vault, or other tenement or hereditament within the said several wards, and who by the laws now in being should be liable to be rated towards the relief of the poor in the respective parishes where he, she, or they should respectively live or reside, for raising such competent sums as the commissioners should judge needful; so

as

1828.

DOBBS against MARTIN.

as such rates or assessments did not in any one year exceed certain sums in the pound of the yearly rents; such rates to be ascertained by the rates at which such respective lands, houses, shops, &c. should be from time to time assessed to the land-tax. And it was also enacted, that it should be lawful for the alderman or his deputy, with the major part of the common councilmen of each ward at the court of wardmote to be holden upon or near the feast-day of *St. Thomas the Apostle* for the choice of ward officers, to return to the said wardmote the names and places of abode of a competent number of substantial *inhabitants* of such ward, of whom so many as the said alderman, &c. should think fit and direct, not exceeding half the number of persons so returned, should be chosen and appointed at the said wardmote to be collectors of the said rates and assessments for one whole year from the said feast-day to the same feast-day then next following, and so yearly and from year to year. And it was also provided that every such collector who should be so chosen should at the wardmote at which he should be chosen, or within twenty-one days then next ensuing, before the alderman of the ward for which he should be chosen collector, or

1828.

DOWNE against MARTYR.

execute the same according to the true intent and meaning of that act, he should for every such refusal or neglect forfeit and pay the sum of 50*l*. There was also a proviso that nothing in the act should extend or oblige persons to serve the office who by the laws then in being were exempted from serving any ward office. The rate imposed by this statute is commonly called the consolidated rate. By the 4 *G.* 4. the penalty is made recoverable by an action of debt in any of his Majesty's courts of record in the name of any one of the clerks to the commissioners, and is made applicable to the purposes of the acts relating to this subject. The plaintiff at the time of the commencement of this action was one of such clerks. The defendant was, at the wardmote court of the ward of *Coleman Street*, held on *St. Thomas's* day 1824, chosen and appointed in the manner required by the act collector of the consolidated rate for the said ward for the year ending on *St. Thomas's* day 1825, having been duly nominated according to the act, and a rate having been duly made for that year; and he refused to take the oath required by the act (not being a Quaker), or to take upon himself the said office. The ground of his objection was, that he was not an inhabitant of the ward within the meaning of this act. He was in other respects liable to serve the office.

The defendant was and is a carpenter and builder, carrying on an extensive business in partnership with his brother Mr. *G. Martyr*, and at the time of the defendant's being chosen to the office in question he was also in partnership with Mrs. *Elizabeth Martyr*, his mother. The defendant's only dwelling-house is at *Greenwich*, in *Kent*, where he with his family resides. Mrs. *E. Martyr* and Mr. *G. Martyr* also reside at

1829.

DONNE against MARTIN.

Greenwich, having separate houses there. The business of the defendant and his partner is principally carried on at a very large yard and premises in *Greenwich*, but for the convenience of business, they have workshops in several parts of *London*, as, for instance, one at *Cotton Garden*, and another at the Treasury. They likewise occupy premises consisting of a counting-house and workshops in *Lothbury*, in the ward of *Coleman Street*, *London*, being the ground floor of Founder's Hall; which premises the defendant and his partner, and previously to them the defendant's father, who was in the same business, have occupied for the last thirty years or thereabouts. For upwards of fifty years past no part of these premises has been used as a dwelling-house, and from the period when the defendant's father took the premises up to the present time they have been used as a counting-house and workshop only. There is no bedroom on the premises, and neither the defendant nor his partner nor any of their workmen or servants ever sleep, nor are any victuals ever cooked upon the premises, and at night, after the workmen have left, the premises are locked up. The defendant was and is rated for the said premises called Founders' Hall to the ward rates, and amongst

1828.

DONNE against MARTYR.

to be chosen. The word inhabitants cannot there mean mere occupiers of property within the ward, who are described in the former sections as persons who are to contribute to the rate; and by a subsequent clause, if no collector is appointed at the wardmote, the commissioners are authorized under the act to appoint fit and able persons, being inhabitants of such ward, to collect the rate. In the 43 *Eliz. c.* 2., which enacts, "That competent sums shall be raised by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, &c. in the parish," the word *inhabitant* has been held to be confined to resiants, *Rex* v. *North Curry* (*a*). Besides the charge of serving the office of collector of the rates imposed by this statute is personal and not pecuniary, and, therefore, according to *Rex* v. *Adlard* (*b*), the word *inhabitants* must be confined in construction to resiants.

Lord TENTERDEN C. J. I think that the defendant is not a person liable to serve the office of collector of rates within the ward. The act authorizes the making of a rate "upon all and every person and persons who should inhabit, hold, occupy, possess, or enjoy any land,

1828.

DONNE *against* MARTYR.

imposed. The duties are to be performed by personal attendance within the ward. It is more convenient to the inhabitants that the duties should be executed by a resiant. For the collector, after demanding the rates, may require those who are to pay them to come to his house to pay them, and it would be a great inconvenience to the inhabitants of this parish to go to a house situate out of the parish. The convenience of the inhabitants, therefore, requires that the office should be executed by a resiant. When we look at the nature of the duties to be performed, and the convenience of the inhabitants of the particular district, I think that the word inhabitant means resiant; and that, consequently, the defendant was not liable to serve the office of collector.

HOLROYD and LITTLEDALE Justices concurred.

Judgment for defendant.

Tuesday, May 6th.

DOE dem. LAWRIE and Another *against* DYEBALL.

Ejectment for

ERROR to reverse a judgment for the plaintiff in

1828.

The King against The Inhabitants of Great Bolton.

and upwards. Before she went to live in the house, but after she had hired it, and put some of her furniture into it, she underlet to one *J. Clough* the cellar under the house at 1*s.* 6*d.* per week, and he occupied the cellar during the whole of *Mary Hall*'s tenancy. The cellar was let unfurnished, and *Clough* occupied nothing but the cellar. The cellar communicated with the street by an outer door, of which *Clough* kept the key; and at the time *Mary Hall* took the house the cellar communicated with the room above in the house, by means of a step-ladder and a trap-door, but when she went to live in the house she took away the step-ladder, which she placed in one of the higher rooms of the house, and shut the trap-door, *expressly for the purpose of preventing any communication between the cellar and the rest of the house.* The trap-door was not fastened, except that the furniture of the house was placed upon it, as upon other parts of the room floor. The trap-door was never used by the cellar tenant or by *Mary Hall.* When the cellar was underlet to *Clough* there was no fire-grate in it, and soon afterwards *Clough* applied to *Mary Hall* for a grate to be put up in the cellar. *Mary Hall* furnished the grate at her own expense, and it remained there

1828.

The KING *against* The Inhabitants of GREAT BOLTON.

Little Bolton, because she did not hold a distinct dwelling-house for a year; she let the cellar. The statute 59 *G.* 3. *c.* 50. requires, inter alia, that in order to gain a settlement by the renting of a tenement, the tenement shall consist of a house or building within the parish, being a separate or distinct dwelling-house or building, or of land, or of both; and that *such* dwelling-house or building shall be held, and such land occupied, and the rent for the same actually paid, for the term of one whole year. Here there was not a separate and distinct dwelling-house held during the year, for the trap-door was closed for the purpose of preventing the communication between the cellar and the other part of the house. In *Rex* v. *North Collingham* (*a*) Lord *Tenterden* C. J. says, "If it had been stated that the key was delivered to the lodger for the express purpose of preventing the communication between the different departments, there would be more weight in the argument." Here a burglary committed in the cellar could not have been laid in an indictment to have been committed in the dwelling-house of the pauper's mother.

Courtenay contrà. A settlement was gained by the mother of the pauper in *Little Bolton*. The act of parliament gives a settlement on certain conditions. Every condition required by the act of parliament has been complied with. The mother hired a tenement, being a distinct and separate dwelling-house. She underlet part but continued tenant of the whole house. The house or building was held by her for one whole year, and the rent paid for that time. *Rex* v. *Tonbridge* (*b*) is an

(*a*) 1 *B.* & *C.* 578. (*b*) 6 *B.* & *C.* 88.

authority

1828.

The King against The Inhabitants of Great Bolton.

authority to shew, that, as to houses and buildings, before the statute 6 G. 4. c. 57., it was sufficient if the tenure subsisted for the year, though as to lands, they must have been occupied. The underletting part of a house or building will not, therefore, prevent a settlement.

Lord Tenterden C. J. The safest course in this case is to give effect to the particular words of the enacting clause. Where the legislature in the same sentence uses different words, we must presume that they were used in order to express different ideas. The words are, "that the house or building shall be held and the *land occupied*." Here the house was held for one whole year, and the pauper's mother gained a settlement in *Little Bolton*. The order of sessions must therefore be quashed.

Order of sessions quashed.

Wednesday, May 7th.

The King *against* The Inhabitants of Great Sutton in the County of Lancaster.

[redacted]

1828.

The KING *against* The Inhabitants of GREAT SHEEPY.

The pauper was bound apprentice by the churchwardens and overseers of the poor of *Great Sheepy*, by a parish indenture of the 28th of *April* 1807, (the pauper being then a poor child of the parish, aged seven years or thereabouts,) to *George Wilkins* of *Deddington*, in the county of *Oxford*, butcher; with him to dwell and serve from the day of the date of the indenture, until the apprentice should accomplish his full age of twenty-one years. The indenture was in the usual form, and was duly executed by all the parties thereto, and in the margin thereof *the magistrates duly signified their consent.* The father of the pauper, whose last place of settlement was *Great Sheepy*, had died four or five years before the date of the indenture, and thereupon his widow had gone with the pauper to reside with her father, *G. Wilkins*, at *Deddington*, the parish of *Great Sheepy* relieving the widow till the pauper was seven years old. The parish then proposed to the mother to put the pauper out apprentice to *Measham* cotton works, and told her that they should no longer relieve her, unless the pauper was apprenticed. Upon this the mother requested the officers to bind the pauper to her father, *George Wilkins*, in order that the boy might not be removed from her. The parish officers consulted the rector (who was himself a magistrate), as to the propriety of acceding to this request; and having received his sanction, they and the mother and *Wilkins* met together, and went before the justices, without the pauper, for the purpose of binding him. The justices allowed the binding, and the indenture was executed by all parties, and a premium of 6*l.* was paid to *Wilkins* by the parish officers. There was nothing in the appearance of *Wilkins* to excite any

suspicion

1828.

The King against The Inhabitants of Great Sheepy.

suspicion that he was an improper person; and there was not any fraud or collusion on the part of the magistrates, or of the parish officers of the appellant parish. The pauper continued to dwell with *Wilkins* in the parish of *Deddington*, after the execution of the indenture, running errands, and doing whatever he was bid to do, till after he was nine years of age, when he left his grandfather, and never afterwards returned to him; but after the binding he continued to go to school by day, as he had gone before, except in the holidays; and he never was informed, nor did he know that he had been bound apprentice, neither did he ever receive any instruction in the trade of a butcher. Indeed, though *G. Wilkins*, the master, had been a butcher, it did not appear that he had ever killed any cattle after the binding, and he was a man in needy circumstances. Upon the above facts the sessions founded their judgment, that the mother of the pauper and the grandfather had colluded together, and fraudulently imposed the grandfather upon the parish of *Great Sheepy* as a proper master for the child; and on the ground of this fraud alone held that no settlement was gained under the indenture, though they acquitted the parish officers

1828.

The KING against The Inhabitants of GREAT-SHEFFT.

Bligh (and *Chilton* was with him) contrà was stopped by the Court.

Lord TENTERDEN C. J. The sessions have found that a fraud was committed, but not by the parish officers. It appears that an imposition was practised on them by the master. If it were competent after a great lapse of time to inquire into the fact, whether fraud had been committed in the binding out of an apprentice by any of the parties to the indentures, a vast number of settlements might be disturbed, and great expense incurred. The law, by requiring in the case of a parish apprentice that the master shall be approved of by two justices, has endeavoured to provide that there shall be a proper master, and that every thing shall be done correctly; and where the justices have sanctioned a binding, and there has been no fraud in the parish officers, the safest course for us is to say, that service under such a binding confers a settlement, although the master may have imposed upon the justices. The court of quarter sessions have mistaken the effect of the fraud found by them. Even supposing that they were right in finding such fraud, still it will not prevent a settlement.

Order of sessions quashed.

1828.

Wednesday, May 7th.

The KING *against* The Inhabitants of MAULDEN.

An order of justices made under the 5 *G.* 4. *c.* 71. stated, "that the justices, after due examination had on oath, *having adjudged* the legal place of settlement of a pauper lunatic, confined in a lunatic asylum, to be in *M.*, did thereby require the churchwardens and overseers of *M.* to pay to the treasurer of the lunatic asylum 10*l.* 16*s.* due for twenty-four weeks' maintenance, &c. being at the rate of 9*s.* per week, and to pay the same weekly sum during so long

THIS was an appeal against an order of two justices, which was in the following words: "To the churchwardens and overseers of the poor of the parish of *Maulden*, in the county of *Bedford*, we, *G. C.* and *T. B.*, clerks, two of his Majesty's justices of the peace acting in and for the said county, by virtue of the powers vested in us by an act of the 5 *G.* 4. entitled 'An Act to amend several acts for the better care and maintenance of lunatics, being paupers or criminals, in *England*,' and by desire of the visiting justices of the General Lunatic Asylum at *Bedford*, in the said county, after due examination had on oath, *having adjudged* the legal place of settlement of *Elizabeth Cole*, now a pauper lunatic confined in the said lunatic asylum at *Bedford*, to be in the parish of *Maulden*, do hereby by virtue of the powers vested in us by an act of the 48 *G.* 3. entitled 'An Act for the better care and maintenance of lunatics, being paupers or criminals, in *England*,' require you,

1828.

The KING *against* The Inhabitants of MAULDEN.

said asylum, from the 2d *November* 1826 to the 19th *April* 1827, the day of making this our order; and we do further order and direct you, the churchwardens and overseers of the poor of the parish of *Maulden*, to pay, from the date hereof, the sum of 9*s*. per week, or such other weekly sum, to the treasurer of the said asylum for the time being, as shall from time to time be fixed upon by the visiting justices of the asylum as a fit rate of maintenance, medicine, and clothing of the said *Elizabeth Cole*, during so long time as *Elizabeth Cole* shall be and remain in the asylum." It appeared by the notice of appeal that the appellants appealed against the order as an order of settlement and maintenance. The sessions having confirmed this order, *Bolland*, in last *Hilary* term, obtained a rule to shew cause why the original order, and the order of sessions, should not be severally quashed for their insufficiency, upon the ground, first, that it did not contain any distinct adjudication that the pauper was settled in *Maulden*, and, secondly, that it was retrospective.

The Solicitor-General, *Hawkins*, and *Kelly*, now showed cause. It appears sufficiently on the face of the order that the justices thereby adjudged the pauper to be settled in *Maulden*. The adjudication is informal, being by recital, yet, as it may be collected from the notice of appeal that there was no other order, the appellants having in their notice treated this order as the order of settlement, it must be taken to be a sufficient adjudication of the pauper's place of settlement. As to the other point, assuming that the order is retrospective, it is only bad as to the by-gone time, and is good as to the residue.

Bolland

1828.

The King against The Inhabitants of Maulden.

Bolland contrà. There is not any distinct adjudication on the face of the order, that the pauper's last place of settlement was in *Maulden*. The statute 5 *G.* 4. *c.* 71. *s.* 3. enacts, that in any case in which a lunatic, whose settlement, by reason of his lunacy, cannot be ascertained, shall be, by the order of two justices, confined in any lunatic asylum, it shall be lawful for any two justices acting for the county in which such asylum shall be situate to examine into the legal settlement of such lunatic, and if satisfactory evidence can be obtained as to such settlement, it shall be lawful for such justices to adjudge the last legal settlement of such lunatic to be in such parish or place as may appear to them to be the place of such legal settlement. There must, therefore, be an adjudication by the justices as to the place of the pauper's last legal settlement. The order of sessions contains no such adjudication, but a mere recital of such an adjudication having been made. But, secondly, the order is at all events bad for that part which relates to the by-gone time. A retrospective order is bad, because the effect of it is to throw a burden incurred at a former period upon inhabitants who ought not to bear it. The justices have no express power to

1828.

The KING *against* The Inhabitants of MADDEN.

Lord TENTERDEN C. J. I think that on reading the order, and the notice of appeal, we must assume that there was but one order, and one proceeding. The appellants by the notice of appeal treat the order in question as an order of settlement. That being so, the first question is, Whether there appears on the face of the order a sufficient adjudication by the justices that the pauper's last place of settlement was in *Madden?* The justices say in their order "that they, by virtue of the powers vested in them by the statute 5 G. 4., after due examination had on oath, *having* adjudged the legal place of settlement of the pauper to be in *Madden.*" Now it is conceded, that if the justices had said "that they *do adjudge,*" it would have been sufficient. As the appellants, however, by their notice of appeal treat the order in question as an order of settlement, we must assume that there was no other order made; and if that be so, we cannot understand the words "having adjudged" to have been used in any other sense than that which would have belonged to the words "do adjudge." The next question is, Is the order good altogether? It is objected to as being retrospective. The effect of a retrospective order is to bring on inhabitants who ought not to bear it a charge incurred during a former period. It is quite unnecessary that the justices should have the power of making a retrospective order; for an order for the payment of a weekly maintenance might have been made as soon as the pauper was placed in the asylum; and as there is not any necessity that the justices should have such power, and as no such power is expressly reserved to them, I am of opinion that they had it not. This order, therefore, so far as it

1828.

The King *against* The Inhabitants of Maulden.

it relates to the bygone time is bad, but good as to the residue.

Rule absolute for quashing the order as to the 10*l.* 16*s.*; discharged as to the residue.

Wednesday, May 7th.

The King *against* The Inhabitants of Combe.

The father of a pauper was about to put him out to service, when it was suggested to him by *A.*, a carpenter, that it would be better for the pauper to learn his (*A.*'s) trade, instead of going to service; and *A.* afterwards hired the pauper to learn his trade, and to do any other work, as well as that of a carpenter. The pauper went to *A.* and served him for five years, living

UPON an appeal against an order of two justices, whereby *J. Davies* the younger, his wife, and children, were removed from the township of *Presteign*, in the county of *Radnor*, to the township of *Combe*, in the county of *Hereford*; the sessions considering that the contract between the pauper and one *Cole* was a defective contract of apprenticeship, and not one of hiring as a servant, and that its sole object was the instruction of the pauper in the trade of a carpenter, confirmed the order, subject to the opinion of this Court on the following case: —

The pauper, *J. Davies*, had a derivative settlement from his father in the township of *Combe*. *J. Davies* the elder, the pauper's father, sixteen years ago, when the pauper was about fourteen years of age, was about to

1828.

The KING *against* The Inhabitants of COMBE.

mother to learn his trade. The pauper was to do any other work as well as that of a carpenter. *Cole* was to find the pauper part of his food and part of his clothing, but he was to lodge at his father's house. In pursuance of this contract the pauper went to *Cole* and served him for five years, lodging in the township of *Presteign* with his parents, who provided part of his clothing and victuals. During the whole five years the pauper did any work *Cole* put him to do, as well as working at the trade of a carpenter. In the second or third year after the pauper had entered upon his service, a conversation took place between the parties about indentures being drawn to bind pauper to *Cole* until the age of twenty-one, in order to exempt the pauper from the militia. The indenture was to be drawn to bind the pauper till he was twenty-one, but it was understood that he was to be free at the end of five years, to be computed from the time of the original contract: no indenture was drawn, nor any thing afterwards said upon the subject. At the expiration of the five years, (that being understood by the parties to be the termination of the original contract, whatever was the nature of it,) the pauper agreed to work with his uncle *Cole* as a journeyman carpenter, under a weekly hiring, and to be paid weekly wages, the pauper boarding and clothing himself; and he was to be at liberty to go away at the end of any week; and he continued with *Cole* under these terms (except upon one or two occasions varying the amount of the weekly wages) for nine or ten years.

Campbell in support of the order of sessions. The question is, Whether a settlement was gained by hiring and service in *Presteign?* The sessions, by confirming

1828.

The King against The Inhabitants of Cosgrove.

the order of removal to *Combe*, have negatived any contract of hiring, and unless their decision be manifestly wrong, the Court will not interfere. But the decision of the sessions is right. Here there was no contract of hiring. The principle to be collected from the authorities relating to contracts of this nature is, that if the object of the master be to teach, it is to be considered as a contract of apprenticeship, but if his object be to get a servant, then it is to be considered a contract of hiring, although the service is to be coupled with learning a trade. The cases of *Rex* v. *Little Bolton* (*a*), *Rex* v. *Eccleston* (*b*), and *Rex* v. *Burbach* (*c*), will be relied upon. The first of these cases has been considered anomalous, and is distinguishable. The object of the master was to get a servant, and the decision proceeded on the ground since overruled, that the relation of master and apprentice could only be created by express words. In *Rex* v. *Hitcham* (*d*), the essence of the contract was hiring. In *Rex* v. *Burbach* it is said by *Bayley* J. that apprenticeship was not contemplated. *Rex* v. *St. Margaret, King's Lynn* (*e*), is expressly in point. There a master shoemaker made a proposal to a poor woman, to take her son to learn his business; the son was to serve him for

1828.

The KING *against* The Inhabitants of COMBE.

Taunton contrà. It is true that the intention of the parties must govern the construction of the contract, but that must be ascertained from the contract itself; and if that be ambiguous, the acts done must be taken into consideration. The case states that *Cole* hired the pauper to learn his trade, and do any other work. The learning of the trade was only incidental to, and not an essential part of, the contract. Now it is established by the authorities, that if a party be hired to learn a trade, and do any other work, that is a contract of hiring. A settlement was therefore gained by the pauper at the end of the first year's service. Then, during the whole five years, the pauper did any work *Cole* put him to. The subsequent statement as to indentures shews that apprenticeship was not contemplated in the first instance. Besides, a special purpose is stated for which the indentures were to be executed. *Rex* v. *Little Bolton* (*a*) has always been considered a leading case on this subject, and never has been over-ruled. In *Rex* v. *St. Margaret, King's Lynn* (*b*), there were circumstances to shew that apprenticeship was contemplated; for it was stated that there would have been indentures at the commencement of the service, but for the poverty of the mother. In *Rex* v. *Burbach* (*c*) the sessions found that there was a contract of hiring and service, and this Court thought them justified in so doing.

Cur. adv. vult. (*d*)

Lord TENTERDEN C. J. now delivered the judgment of the Court; and, after stating the facts of the case, proceeded as follows: —

(*a*) *Cald.* 367. (*b*) 6 *B. & C.* 97. (*c*) 1 *M. & S.* 370.
(*d*) This case was argued on a former day in this term.

1828.

The King against The Inhabitants of Cestre.

The question in this case is, Whether the pauper served in *Presteign* as an apprentice, or as a yearly servant? It is clearly established by the authorities, that if an apprenticeship was only contemplated by the parties, and there was an imperfect contract of apprenticeship, the service will give no settlement. The case of the *King* v. *St. Margaret, King's Lynn* (*a*), was relied upon in support of the order of sessions. There a master shoemaker made a proposal to a poor woman to take her son to learn his business. The son was to serve him for four years, to board and lodge with his mother, and to have half what he earned. No indentures were executed on account of the poverty of the mother; and it was held that that was a defective contract of apprenticeship, and not a contract of hiring; and, consequently, that the pauper did not gain any settlement by serving under it. The judgment in that case delivered by my Brother *Holroyd* appears to me to apply to this. He there says that he was of opinion "that the relation of master and apprentice was contemplated by the parties, or at least that there was not sufficient ground to warrant the Court in concluding that the relation of master and servant was contemplated by the

1828.

The KING *against* The Inhabitants of COME.

and it was for the mother to consider whether she would consent to the proposal made to her." In this case it appears that the father of the pauper was about to put the pauper out to service, and that *Cole*, a carpenter, suggested that it was better for the pauper to learn his (*Cole's*) trade, instead of going to service. This was the proposal made by *Cole*, and it was for his father to consider whether he would consent to it. If the father had then put the son out to *Cole*, it would clearly have been in the character of an apprentice, and not in that of a hired servant. The case then states, that *Cole* hired the pauper from his mother, *to learn his trade*. The object, therefore, of the master was, that the pauper should learn his trade, or, in other words, that he should serve him as an apprentice, and not as a servant. That being so, I think, to use the words of my Brother *Holroyd*, in *Rex* v. *St. Margaret, King's Lynn* (*a*), there was not sufficient in this case to warrant the sessions in finding that the relation of master and servant subsisted between these parties. The fair inference from the facts stated is, that there was not in this case any contract of hiring, but a defective contract of apprenticeship. No settlement, therefore, was gained in *Presteign*, and the order of sessions must be affirmed.

Order of sessions affirmed.

(*a*) 6 *B.* & *C.* 97.

1828.

Wednesday, May 7th.

The KING *against* The Inhabitants of SHIPTON, in the County of SALOP.

The master of a parish apprentice not having work sufficient for him, proposed to him to go to a farm in a different parish, occupied by the master's sister. The pauper assented to the proposal, and agreed with her to work there for a twelve-month for his meat and drink. He worked for her for four years and four months. During the first two years he received from her meat and drink. During the third and fourth he received wages: Held, first

UPON an appeal against an order of two magistrates, dated the 14th of *May* 1827, whereby *William Partridge* and his wife were removed from the parish of *Dudley*, in the county of *Worcester*, to the parish of *Shipton*, in the county of *Salop*; the sessions confirmed the order, subject to the opinion of this Court on the following case: —

The pauper, *W. Partridge*, at the age of thirteen years, was under indentures, bearing date the 3d of *September* 1816, put out an apprentice for seven years, by the officers of the parish of *Stanton Long*, in the county of *Salop*, with the consent of two magistrates in the usual manner, to *John Taylor*, who occupied a farm in that parish. After the pauper had been some months at his master's farm, *Taylor* not having sufficient work for him, asked him if he would go over to a farm called the *Moorhouse*, in the parish of *Shipton*, to drive the plough.

1828.

The KING *against* The Inhabitants of SHIPTON.

his sister, respecting the proper management of her farming affairs. He also gave orders to her servants, but never gave any orders to the pauper after he had been sent to the *Moorhouse* as before mentioned. *Taylor* never told the pauper *William* that he might hire himself, or make any engagement with Mrs. *Corser*, but retained possession of the indenture of apprenticeship, and produced it in Court on the trial of the appeal. No agreement or bargain was ever made between *Taylor* and his sister, respecting the services of the pauper. On the arrival of the pauper at the *Moorhouse*, Mrs. *Corser* asked him if he would stay and drive the plough for his meat and drink for a twelvemonth? he replied that he would, and she sent him to the field to drive the plough. For his services at the *Moorhouse* for the first and second years the pauper was not paid any money, but was found in clothing (except a pair of shoes and some stockings), and in meat and drink by Mrs. *Corser*. At the end of the second year he hired himself for a year to Mrs. *Corser* for 5*l.*, and served that year, and received the full amount of his wages. When that period had expired, he hired himself again for a year at 6*l.*, and received that sum at the completion of the year. During the time that the pauper was in the service of Mrs. *Corser*, which was four years and four months, he never received any orders from *Taylor*, nor did he ever return to *Taylor*'s farm after he first quitted it, as before stated. No assignment of the indenture was made, nor was the consent of any magistrate obtained for placing the pauper *William* with Mrs. *Corser*. When he had been for two years at Mrs. *Corser*'s *Taylor* became insolvent and quitted his farm, after which he ceased to have any thing to do with the *Moorhouse*, and saw no more of the pauper. Before *Taylor*'s insolvency,

1828.

The King against The Inhabitants of Sarron.

solvency, and whilst the pauper worked at the *Moorhouse*, *Taylor*, on the application of the pauper's mother, furnished him with some shoes, and on another occasion supplied him with wool to make stockings for him; he also employed a surgeon to attend him whilst labouring under a complaint, and paid his bill. When the pauper left the *Moorhouse* the term of his apprenticeship had not expired. The question for the consideration of the Court was, Whether this apprentice had not been put away and dismissed from the service of his master, within the meaning of section 9. of *56 G. 3. c.* 139. which came into operation on the 1st of *October* 1816, so that he could not obtain a settlement in *Shipton* by means of his service there? or whether the service in *Shipton* was by law a service under the indenture of apprenticeship, so as to confer a settlement in that parish?

F. Pollock and *Wallinger* in support of the order of sessions. A settlement was gained in *Shipton* by apprenticeship. The service in that parish to Mrs. *Corser* was by consent of the first master, and, therefore, was a good service under the indenture. Secondly, the gain-

1828.

The King *against* The Inhabitants of Sussex.

vice under the indenture after such putting away; and the tenth section imposes a penalty upon any master for so doing. Now as the statute imposes a penalty, it must be construed strictly, and so construing it, there was no putting away of the apprentice by *Taylor* in this case. The putting away imports an act done by the master. He merely sent him to a farm in the occupation of his sister, Mrs. *Corser*, which he (*Taylor*) superintended. He provided the pauper with wearing apparel and medical attendance when required. He neither gave permission to the pauper to hire himself to, or make any engagement with, Mrs. *Corser*, nor intimated any intention of dismissing the apprentice from his service for any definite period of time. The fact of his having provided the pauper with clothes shews clearly that he was considered by *Taylor* as in his service.

Campbell contrà. First, independently of the statute 56 *G.* 3. *c.* 139. *s.* 9. the pauper gained no settlement by the service in *Shipton*, because the service was not referable to the indenture of apprenticeship, but to a contract of hiring. *Rex* v. *Whitchurch* (*a*) is expressly in point. Assuming, however, that the service in *Shipton* was a service under the indenture, the pauper was prevented from gaining a settlement by the provisions of the 56 *G.* 3. *c.* 139. *s.* 9. The former statute of the 32 *G.* 3. *c.* 57. *s.* 7. had prohibited masters from assigning parish apprentices without the sanction of two magistrates. The ninth section of the 56 *G.* 3. *c.* 139. recites, that it might be expedient that those to whom parish apprentices were bound or assigned should be empowered to *place out* or assign over such

(*a*) 1 *B.* & *C.* 574.

appren-

1828.

The King against The Inhabitants of Sutton.

apprentice to others, and that it was proper that such placing out or assignment should in all instances be under the inspection and controul of the magistrates. The object of the legislature was, that no parish apprentice should be placed out without the consent of justices. The statute then proceeds to enact, "that it shall not be lawful for any master to put away or transfer his apprentice to any other, or in any way discharge or dismiss him from his service, without such consent; and that no settlement shall be gained by any service of such apprentice after such putting away, unless such service shall have been performed under the sanction of such consent as aforesaid." The fair meaning of that is, that he should not place out or put away such apprentice from his service for any period whatever without the consent of the justices. Here the master not only permitted the pauper to go into the service of another, but to continue in such service for four years. That was a putting away of the apprentice from his service during that period.

Lord Tenterden C. J. Upon both grounds I think that the justices were wrong in the conclusion to which

1828.

The KING *against* The Inhabitants of SUTTON.

have gained a settlement by hiring and service if he had not been an apprentice. The service was not under the indenture, but under the contract of hiring.

I also think that no settlement was gained, because there was, in this case, a putting away of the apprentice within the meaning of the 56 *G.* 3. *c.* 139. *s.* 9. The 32 *G.* 3. *c.* 57. *s.* 7. recites, that it frequently happened that persons were compellable under the act of the 9 & 10 *W.* 3. to take a greater number of parish apprentices than it was convenient for them to maintain or employ in their own families, and they were, therefore, forced to *place out* or assign over such apprentices to other persons, and that it was proper that such assignment should be legally made under the inspection and controul of the magistrates, as well for the benefit of the apprentice as that the original master might be discharged from his covenants in respect of such apprentice; and that it was fit that the person to whom such assignment should be made, and also the apprentice, should be subject to the ordinary jurisdiction of justices of the peace with respect to masters and parish apprentices; and it then enacts, "that it shall be lawful for the master of any such parish apprentice, by indorsement on the indenture, &c. with the consent of two justices, to assign such apprentice to any person willing to take such apprentice for the residue of the term mentioned in such indenture." Notwithstanding this statute, it was discovered that many grievances had arisen from the binding of poor children as apprentices by parish officers to improper persons, whereby the parish officers and the parents of such children were deprived of the opportunity of knowing the manner in which such children were treated; and also from the permission given to apprentices by the

persons

1828.

The King against The Inhabitants of Sherston.

persons to whom such apprentices had been bound, to serve others without a formal assignment, whereby the discretion required by the statute to be exercised by magistrates in placing out apprentices to suitable persons was frequently rendered of no avail. Those mischiefs are provided for by the statute 56 *G.* 3. *c.* 139. *s.* 9., which recites, "that it was expedient that those to whom parish apprentices were bound or assigned should be empowered *to place out* or assign over such apprentice to others, and that it was proper that such *placing out* or assignment should in all instances be under the inspection and control of the magistrates, and that it was fit that the person to whom such putting out or assignment should be made, and the apprentice, should be subject to the ordinary jurisdiction of justices of the peace, and that it was inexpedient that any master or mistress should in any way discharge or dismiss from his or her service any parish apprentice without the consent of such justices;" and it then enacts, "that it shall not be lawful for any master to put away or transfer any parish apprentice to any other, or *in any way* to discharge or dismiss from his or her service any parish apprentice without such consent of justices as was directed by the

1828.

The King against The Inhabitants of Sutton.

the words of the ninth section of this statute, and, consequently, that no settlement was gained after the putting away of the pauper to Mrs. *Corser*. The order of sessions must, therefore, be quashed.

BAYLEY J. *Rex* v. *Whitchurch* (*a*) is expressly in point to shew that no settlement was gained by apprenticeship in this case, on the ground that the service in *Shipton* was not referable to the indenture, but to the contract of hiring. I think, also, that the pauper gained no settlement in *Shipton*, because there was a putting away of the apprentice within the meaning of the 56 *G.* 3. *c.* 139. *s.* 9. The object of the legislature was to protect parish apprentices, who are unable to protect themselves, and to place them under the protection of the magistrates. We ought, therefore, to adopt such a construction as will best effectuate the intention of the legislature. The 32 *G.* 3. *c.* 57. *s.* 7. prohibited masters from assigning parish apprentices without the consent of the justices. In the recital of that section, the words "*place out or assign*" occur, but, in the enacting part, the assignment alone is prohibited. But the 56 *G.* 3. *c.* 139. *s.* 9. recites, "that it is expedient that the *placing out* or assignment of parish apprentices should, in all instances, be under the inspection and controul of the magistrates," and enacts, "that it shall not be lawful for any justices to put away or transfer any parish apprentice without such consent, and that no settlement shall be gained by any service of such apprentice, after such putting away or transfer, unless such service shall be performed under the sanction of such

(*a*) 1 *B.* & *C.* 574.

consent

1828.

The King *against* The Inhabitants of Shifnal.

consent as aforesaid." An *assignment* imports a transfer of the services of the apprentice for the residue of his term. But an apprentice may be said to be *placed out* when the master consents to the apprentice serving another individual, so as to become subject to the controul of that other. Here it is evident that the legislature intended to prohibit the placing out, without consent of the justices, as well as the assignment. I think that in this case the master placed out the apprentice to Mrs. *Corser*, or put him away, and, consequently, that the service, after such putting away without consent, gave no settlement.

Order of sessions quashed.

Wednesday, May 7th.

The King *against* The Inhabitants of Stourbridge.

The mother of a pauper stated, that about twenty-four years ago she received money from the parish officers of *S.* to put her son out

UPON an appeal against an order of two justices, bearing date the 27th day of *April* 1827, whereby *G. Layton*, his wife, and four children, were removed from the parish of *Bromsgrove*, in the county of *Worcester*, to the township of *Stourbridge* in the same

1828.

The KING *against* The Inhabitants of STOURBRIDGE.

given to his mother. The mother of the pauper being examined on the part of the appellants, stated, that about twenty-four years ago she received some money from the overseers of *Stourbridge* to put her son out apprentice, and that she accordingly put the pauper, at the age of seven years, apprentice to one *Clay*, of the parish of *Bromsgrave*, who was her brother-in-law; that the indenture was signed by her, by the pauper *G. Layton*, by the master, and by the man who had filled it up; that she gave the indenture to *Nanny Badger* to take to *Stourbridge* to the overseers who had given her the money to pay for the stamp for it; that it was directed to the overseers of *Stourbridge*; that *Nanny Badger*'s husband was a market gardener, and used to attend *Stourbridge* market; that sometimes he, and sometimes his wife, went to market, and the indenture was to be carried to the overseers by either the husband or the wife when they went to market; that both *Nanny Badger* and her husband were since dead, but that she had survived her husband; that she did not know whether *Nanny Badger* had left any will, but she had heard that she had. The appellants further proved by *John Moseley*, an overseer of *Stourbridge*, that he had searched diligently in the chest where the papers of the township are kept for the indenture of apprenticeship, but had not been able to find it; and that he had applied to the executor of *W. Badger*, the husband of *Nanny Badger*, who had informed him that the indenture had never come to his hands, and that he was certain that no such paper was in *W. Badger*'s possession when he died. Under these circumstances the appellants proposed to give secondary evidence of the due execution and contents of the indenture. But this evidence

1828.

The King against The Inhabitants of Stourmouth.

was objected to on the part of the respondents, and disallowed by the court of quarter sessions, on the ground that sufficient evidence had not been given of the loss of the indenture. The question for the opinion of this Court was, Whether, under the circumstances stated, secondary evidence ought to have been admitted of the execution and contents of the indenture?

Shutt in support of the order of sessions. The secondary evidence was properly rejected, because sufficient evidence of the loss of the indenture was not given. This was not an useless instrument, for it would be required whenever it became necessary to prove the pauper's settlement. The parish officers, therefore, had an interest in preserving it. Application ought to have been made to the overseer to whom the indenture was sent. There was no evidence to shew that he was dead. The mother was the witness of the appellants. It was for them to establish their case, and to shew that the indenture was lost. The parish chest was the proper depository; but when it was not found there, the inference is that it never had been there. It might have been delivered to the overseer to whom it had been

1828.

The KING *against* The Inhabitants of STOURBRIDGE.

Lord TENTERDEN C. J. I think that under the circumstances of this case there was reasonable evidence of the loss or destruction of the indenture, and that the secondary evidence ought to have been received. If it had been handed over to the overseers it would have been placed in the parish chest, for it was their duty to place it there. Not having been found there, the natural presumption is that it is lost.

BAYLEY J. If the indenture ever found its way into the parish chest, which was the proper place of custody if it had been delivered to the parish officers, it would have been there. Not being there, the presumption is that it is lost or destroyed.

Order of sessions quashed.

The KING *against* The Inhabitants of BARHAM.

Thursday, May 8th.

A pauper on the 6th of *April* 1823 hired a house for a year at the rent of 12*l.* per annum in the parish of *A.* In *January* 1824 he became chargeable to that parish, and was, by an order of justices, removed to the parish of *B.* There was no appeal against the order of removal. The pauper returned on the same day to his house in the parish of *A.*, and continued to occupy it until the expiration of the year for which he had hired it, and paid the rent for the year: Held, that as the pauper had hired and held the house for a year, and paid the rent for that period, all the requisites of the statute 59 *G.* 3. *c.* 50. had been complied with, and that he gained a settlement in the parish of *A.* by renting a tenement.

UPON an appeal against an order of two justices, whereby *Henry Whelch*, his wife and children, were removed from the parish of *Barham*, in the county of *Kent*, to the parish of *St. Mary the Virgin*, *Dover*, in the same county, the sessions quashed the order, subject to the opinion of this Court on the following case: —

The pauper *Henry Whelch*, on the 6th of *April* 1823, hired a house of one *Redman* in the parish of *St. Mary the Virgin*, in *Dover*, by the year, of the yearly value

1828.

The King against The Inhabitants of Barham.

and at the rent of 12*l.* per annum, payable monthly. In *January* 1824, the pauper, who was a butcher, became chargeable to the parish of *St. Mary the Virgin*, and was, together with his family, directed to be removed, by an order of two justices, from that parish to the parish of *Barham*. The pauper *alone* was removed, and *Pope*, one of the then overseers of the parish of *Barham*, received him, and gave him 2*s.* 6*d.*, and directed him to return to *Dover*. The pauper returned the same day to his house in *Dover*, and continued to occupy it, under the original contract, until *Michaelmas* 1824; when, in consequence of certain threats of Mr. *Hubbard*, an overseer of the poor of the parish of *St. Mary the Virgin, Dover*, to send him to gaol for coming back to *Dover*, he agreed with the landlord of the house to take it by the week, at the rent of 5*s.* weekly. At *Michaelmas* 1824 the pauper owed some rent; and no final settlement of the rent took place till *July* 1825, when the landlord having put a distress into the house, the pauper paid the rent, and left the house, which he had occupied first under the yearly and then under the weekly hiring uninterruptedly since the 6th of *April* 1823. The pauper during his occupancy paid his

1828.

The KING *against* The Inhabitants of BARHAM.

Bolland and *D. Pollock* in support of the order of sessions. The order of removal to *Barham* was made in *January* 1824. The pauper at that time had not held or occupied the house rented by him in *Dover* for the term of one whole year. Unless, therefore, the occupation previous to that order of removal can be connected with that which was subsequent to it, the pauper did not hold for a year so as to gain a settlement. All the acts necessary to confer a settlement must be done before the order of removal. Here, when the pauper first became chargeable, he had not held the house for the term of one whole year, so as to gain a settlement by the 59 G. 3. c. 50. He was guilty of an offence against the law by returning to *Dover* after the first order of removal. *Rex* v. *Fillongley* (a) certainly established that an order of removal does not put an end to a contract respecting the renting of a tenement; and it was there decided, that a pauper returning after the execution of an order of removal to a tenement held under such a contract gained a settlement by residing forty days after the removal. But the statute 59 G. 3. c. 50. requires that the tenement, if it consist of a house, must be held for the term of one whole year. It is clear, therefore, that in this case the pauper could not gain any settlement by the holding subsequent to the order of removal. And *Rex* v. *The Inhabitants of Kenilworth* (b) is expressly in point to shew, that after an order of removal not appealed from, a new settlement can only be gained by some act or cause altogether subsequent to the order of removal. There a pauper in service at *A.*, under a hiring for a year, was removed to *B.* and did not appeal, but returned in a few days to his master at *A.*, was received by him, served out the year, and was

(a) 2 *T. R.* 709. (b) 2 *T. R.* 598.

1828.

The KING against The Inhabitants of BARHAM.

paid his full wages; it was held that he gained no settlement in *A.* *Buller* J. in that case says, "The pauper returned, after the order of removal, to the parish of *Birmingham*, where he served a month; but that could not gain him a settlement there, for the act subsequent to the order of removal, by which he was to gain a settlement, should be complete in itself."

Brodrick and *Thesiger* contrà. This case is distinguishable from *Rex* v. *Kenilworth* (*a*). There the contract was a contract of hiring, and the justices who made the order of removal had the power of putting an end to such a contract; and the contract having been determined, there was an interruption of the service, and, consequently, the service before the order of removal would not connect with that which was subsequent to it. But the magistrates in this case had no power to put an end to a contract between a landlord and tenant respecting the taking of a tenement. Independently of the order of removal, it is clear that a settlement was gained in *Dover*. For all the things required by the *59 G. 3. c. 50.* have been done. The pauper hired the house, paid the rent, and held it for the term of one whole year. If there

tive hiring will connect with an occupation under a yearly hiring; and if continued for the term of a year, will confer a settlement.

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court; and after stating the facts of the case, proceeded as follows: — The question depends on the statute 59 G. 3. c. 50, which enacts, "that no person shall acquire a settlement by or by reason of his or her dwelling for forty days in any tenement rented by such person, unless such tenement shall consist of a house or building being a separate and distinct dwelling-house or building bonâ fide hired by such person at and for the sum of 10*l.* a year at the least for the term of one whole year; nor unless such house or building shall be held, and such land occupied, and the rent for the same actually paid, for the term of one whole year at the least, by the person hiring the same." The language of this enactment is very peculiar. No person is to acquire a settlement by reason of dwelling forty days in any tenement, unless such tenement shall consist of a house (as it does in the present case) bonâ fide hired by such person at the sum of 10*l.* a year for the term of one whole year, nor unless such house shall be held, and the rent for the same actually paid, for the term of one whole year at the least. It should seem, therefore, that if a pauper resides for forty days upon a tenement, and the other requisites of the act have been complied with, he gains a settlement. Now in this case the pauper resided in the house more than forty days both before and after the removal, and all that the act requires in other respects was complied with. The house was taken for a year, and held for upwards of that period,

1828.

The King against The Inhabitants of Barham.

and the rent was actually paid for the term of one whole year. It has been contended that the effect of the order of removal was to prevent the gaining of any settlement unless all that the act requires has been complied with after that order was made. If the effect of the order of removal had been to compel the pauper to abandon his tenement, it would make a difference. But he was absent from his home not even a day, and his family were never removed at all. It was admitted in the argument that *Rex* v. *Fillongley* (a) had decided that the removal did not put an end to the contract between the landlord and tenant; and, under all the circumstances, we think it safer to say that a settlement was gained in *Dover* under the 59 *G.* 3. *c.* 50. by the residence before and after the removal. It was insisted that the return of the pauper after the removal was an offence against the law; but since the 35 *G.* 3. *c.* 101. this may admit of considerable doubt. Before that act a person likely to become chargeable was removable, and if he returned after the removal, he returned in the same condition; but as that act renders a person irremovable, unless actually chargeable, he may, after his removal, return with the means of subsistence, and it is difficult to say that by so returning

1828.

BOLLAND and Others, Assignees of W. MARSH and Others, Bankrupts, and also of H. FAUNTLEROY, a Bankrupt, *against* J. NASH.

Friday, May 9th.

ASSUMPSIT on two bills of exchange; one for 3000*l.*, dated the 17th of *July* 1824, payable three months after date, drawn by *H. Fauntleroy* on the defendant, and accepted by him, and indorsed by the drawer to the bankrupts; the other bill for 1000*l.* of the same date, payable also three months after date, and drawn, accepted, and indorsed in like manner. Plea, general issue. At the trial before Lord *Tenterden* C. J. at the *Middlesex* sittings after *Trinity* term 1827, a verdict was found for the plaintiffs for 2760*l.* 11*s.*, subject to the following case: —

A. kept cash with *M.* and Co. bankers, and accepted a bill drawn by one of the partners in the house of *M.* and Co., and indorsed by that partner to *M.* and Co., who discounted it, and afterwards indorsed it for value to *S.* Before the bill became due, *M.* and Co. became bankrupts, having funds in the hands of *S.* more than sufficient to pay the bill, and having in their hands money belonging to *A.* When the bill became due *S.* presented it for payment to *A.*, who having refused payment, *S.* paid himself the amount out of the funds of *M.* and Co. remaining in his hands, and delivered the bill to their assignees: Held, in an action brought by the assignees against *A.*, as acceptor of the bill, that there had been before the bankruptcy a mutual credit between the bankrupts and *A.*, and that the latter was entitled to set off against the sum due to the bankrupts on the bill, the debt due to him from *M.* and Co. at the time of their bankruptcy.

The bills for 3000*l.* and 1000*l.* were drawn and accepted as stated in the declaration. The bankrupts *Marsh* and Co., who were the defendant's bankers, discounted the bills for the defendant on the 17th of *July* 1824, and the drawer indorsed the bills in blank, and delivered them to the bankrupts, and afterwards, and before *Marsh* and Co. became bankrupts, and before the bills became due, Messrs. *Martin*, *Stone*, and *Stone* discounted the bills for the bankrupts, who indorsed the bills in blank, and delivered them to *Martin* and Co. *Marsh* and Co. having become bankrupts on the 16th of *September* 1824, commissions of bankrupt

were

1828.

BOLLAND against NASH.

were duly issued against them, and the plaintiffs were duly appointed assignees. At the time of the bankruptcy the defendant had two accounts with the bankrupts, one in his own name, the other in the names of *Nash* and *Lyon*. On the former of these he had overdrawn to the amount of 1478*l.* 11*s.* 6*d.*, independently of the outstanding bills on which the action was brought. On the latter account there was a balance in his favour to the amount of 8839*l.* It was admitted at the trial that for the purpose of mutual credit, or set-off, both accounts were to be considered as the accounts of the bankrupts with the defendant solely. But at the time of the bankruptcy, the bankrupts also held other bills accepted by the defendant to the amount of 5000*l.* At the time of the bankruptcy *Martin* and Co. still held the bills declared on, and they then had in their hands money of *Marsh* and Co. to the full amount of the bills, which did not become due till afterwards, viz. on the 20th of *October*. When they fell due *Martin* and Co. duly presented the bills for payment, but the defendant refused to pay them; whereupon *Martin* and Co. immediately paid themselves the amount of the bills, without interest, out of the money of *Marsh* and Co. in their

and, secondly, Whether any and what interest can be recovered in this action? (a)

Chitty for the plaintiffs. The question is, Whether there was a mutual credit between the bankrupts and the defendant before they became bankrupts, so as to entitle him to deduct from the sum claimed by the plaintiffs the money due to him from the bankrupts, at the time of the act of bankruptcy? Here the defendant gave credit to the bankrupts, by trusting them with his money. But the bankrupts, at the time of the act of bankruptcy, gave no credit to the defendant. In *Dickson* v. *Evans* (b), Lord *Kenyon* states, that the question must be considered in the same manner as if it had arisen at the time of the bankruptcy, and cannot be varied by any change of the situation of one of the parties. Now at the time of the bankruptcy there was nothing due from the defendant to the bankrupts, for the bills were then in the hands of *Martin, Stone,* and Co. There was no credit, therefore, at that time given by the bankrupts to the defendant, but the credit was given by *Martin, Stone,* and Co. In *Ex parte Hale* (c), the acceptor of a bill becoming bankrupt, the indorser before the bankruptcy took up the bill; and it was held that he was entitled to prove under the commission, but could not set it off against a debt due from him to the estate. In *Ex parte Burton* (d), *Burton* was the drawer, and *De Franco* and *Corea* were the acceptors of a bill for 200*l.*, which *Burton* had discounted with his bankers, *Kensington* and Co. They became bankrupts before

(a) It was afterwards agreed that the second question should be settled out of court.

(b) 6 *T. R.* 57. (c) 3 *Ves.* jun. 304. (d) 1 *Rose, B. C.* 320.

the

1828.

BOLLAND against NASH.

the maturity of the bill, having then in their hands a balance upon *Burton*'s account to the amount of 310*l.* The bill came to the hands of *Kensington* and Co.'s assignees. The Lord Chancellor held, that there was no mutual credit between *Kensington* and Co. and *Burton*, and refused to allow the latter to set off the sum due to him by *Kensington* and Co.

F. Pollock contrà. The defendant gave credit to the bankrupts, by depositing his money in their hands. The bankrupts gave credit to the defendant, by taking his bills for 3000*l.* and 1000*l.* The defendant at that moment became their debtor, and they became his creditors, though it was debitum in præsenti solvendum in futuro. The bankrupts trusted the defendant to the amount of the sum secured by the bills; and though they afterwards parted with the bills they still trusted him, and believed that he would, when called upon, pay them. Assuming, however, that the bankrupts by parting with the bills ceased to give credit to the defendant, still, when they were returned to their assignees, they were remitted to the original rights of the bankrupts. The credit in the interim was only suspended,

of opinion that Lord *Cork*'s administrator was entitled to set off against the debt due to *Shepherd* the payments after the bankruptcy, and ordered that the plaintiff should be at liberty to prove for 273*l.* 6*s.*

Lord TENTERDEN C. J. I am of opinion that the defendant is entitled to set off against the sum due to the plaintiffs on the bills the sum of 2351*l.* 8*s.* 6*d.*, on the ground that there was before the bankruptcy a mutual credit between the bankrupts and the defendant within the meaning of the statute 5 *G.* 2. *c.* 30. The twenty-eighth section of that statute enacts, "that where it shall appear to the commissioners that there hath been mutual credit given by the bankrupt, or any other person, at any time *before such person became bankrupt*, the commissioners or the assignees may state the account between them, and one debt may be set off against another, and the balance only shall be paid." The question, therefore, is, Whether in this case there was a mutual credit between *Nash* and *Marsh* and Co. before the bankruptcy of the latter? The bills were drawn by one of the partners in the house of *Marsh* and Co., and accepted by *Nash*. They were drawn for the convenience of the latter. *Marsh* and Co. gave him credit as the acceptor of the bills. He had money in their hands; he therefore gave them credit. There was a mutual credit originally constituted. If there was once a mutual credit constituted between these parties, was it in the power of *Marsh* and Co. by any act of their own to put an end to that mutual credit, so as to deprive the defendant of his right to set off any debt due from them to him against the sum claimed by them or their assignees from him as acceptor of those bills? It cannot be denied that if *Marsh* and Co. had always kept the bills in

1828.

BOLLAND against NASH.

in their own hands there would have been a continuing mutual credit between them and the defendant, and that the latter, therefore, would have been entitled to deduct the sum due to him from *Marsh* and Co. at the time of their bankruptcy from the sum claimed by their assignees from him as the acceptor of the bills. I think that *Marsh* and Co., the holders of the bills, could not by their own act put an end to the mutual credit originally constituted between them and the defendant, so as to deprive the latter of his right to set off any debt due from them to him against the sum claimed by them, or (in the event of their bankruptcy) by their assignees from him as the acceptor of those bills. This case is distinguishable from the two cases cited. In *Ex parte Hale* (*a*) it does not appear that *Hale* was the drawer of the bill; no credit, therefore, was originally constituted between him and the bankrupt. In *Ex parte Burton* (*b*) the bill was drawn by *Burton* and accepted by *De Franco* and *Corea*. *Burton* was one of the petitioners, and he was the person who ought to have paid that bill as between him and *De Franco* and *Corea*. But here *Nash* was the person who ought to have paid the bills. Upon the whole, I am of opinion that the defendant was entitled

and Co. might have maintained an action for money had and received to their use. *Nash* gives credit to *Marsh* and Co. for the money in their hands. Here, therefore, there was a mutual credit between the bankrupts and the defendant, without the intervention of any third person. In *Ex parte Hale* (*a*), there was no immediate connection between the indorser of the bill and the bankrupt. There was no credit given by the acceptor to the indorser. At no period, as between them, was there a debitum in præsenti solvendum in futuro. In *Ex parte Burton* (*b*), it was impossible to come to any other conclusion than that which was come to on the principle of set-off. Who were the debtors on the bill in that case? *De Franco* and *Corea*: they were the acceptors of the bill. *Burton* was the drawer; and having money in *Kensington* and Co.'s house when they failed, endeavoured by the petition to transfer his right against *Kensington* and Co. to *De Franco* and *Corea*. That case, therefore, is distinguishable from the present.

HOLROYD J. concurred.

LITTLEDALE J. There was a mutual credit originally constituted between the defendant and the bankrupts. They afterwards pay the bills away, but they are returned to them by *Martin*, *Stone*, and Co. If they had never parted with the possession of the bills, there would have been a continuing mutual credit. There may have been a temporary suspension of the mutual credit; but it revived when the bills again came into the hands of the bankrupts or their assignees.

Judgment for defendant.

(*a*) 3 *Ves.* jun. 304. (*b*) 1 *Rose, B. C.* 320.

1828.

Friday, May 9th.

The KING *against* The Bishop of ELY.

Mandamus granted to compel a bishop to allow inspection of his register of presentations and institutions to a living in his diocese, by a person claiming the right of patronage, although the bishop also claimed that right.

A RULE had been granted, calling upon the Bishop of *Ely* to shew cause why a mandamus should not issue, commanding him to allow —— *Finch*, clerk, to inspect his registry of presentations and institutions to the living of *Cottenham*, in the diocese of *Ely*, from the time of the dissolution of monasteries, and to take copies of them. It appeared by the affidavits that *Finch* and the Bishop of *Ely* were adverse claimants of the right of patronage of this benefice.

Storks Serjt. and *Patteson* shewed cause. In the *Mayor of Southampton* v. *Graves* (*a*) the Court refused to compel a corporation aggregate to allow an inspection of their books; and Lord *Kenyon* said, there was no difference in that respect between corporations aggregate and sole. And again in *May* v. *Gwynne* (*b*) the Court would not compel the Plaintiff, who was a vestry clerk, to exhibit to the defendant, a parishioner, certain parish papers in his possession; but it must be admitted

1828.

The KING *against* The Bishop of ELY.

therefore, if he does it, the book is of a private nature for his own information. The presentations themselves are the proper evidence; the copies kept by the bishop would not be evidence for him, although they might be evidence against him, being kept by himself. The courts have never compelled the production of such an instrument. If, however, they would be evidence on either side, the cases of *Cox* v. *Coppin*, and *Turner* v. *Gethin* (a), are strong authorities against the motion, the dispute being a private one between two individuals as to the right of patronage of a benefice.

Sir *J. Scarlett* contrà. In *Gibson's Codex*, 858. it is stated to be the duty of the ordinary to make in his public register an entry of all institutions for several purposes; and, amongst others, that the title of the patron may not suffer by the want of proper evidence upon whose presentation it was that institution was given. The very object of the entry, therefore, is to furnish evidence for the patron.

Lord TENTERDEN C. J. I am of opinion that this rule must be made absolute. The books of a corporation are kept for the use of the body at large, or that of the individual members, and not for the use of strangers; so also are parish books; but a bishop's register of institutions is kept for the use of all persons claiming title to livings in his diocese. It, therefore, differs from the others, and is of a public nature; and although the Bishop himself may claim the right of patronage, that

(a) *Vin. Abr. Ev.* (F b) pl. 11.

1826.

The King *against* The Bishop of Ely.

is no reason why another claimant should not have access to the register.

BAYLEY J. I think that the circumstance of the bishop's claiming title makes the case stronger in favour of this application; for he should not, in order to gain a private benefit, be allowed to withhold public documents.

Rule absolute.

Monday, May 12th.

The KING *against* EVERETT.

An information stated that certain goods were about to be imported into *Great Britain* from parts beyond the seas, in respect of which certain duties would be payable; and that one *R. H.*, at the time of committing the offence thereinafter mention-

INFORMATION for unlawfully soliciting a custom-house officer to neglect his duty. The third count stated that heretofore, to wit, on the 6th day of *October*, in the 8th *G.* 4., at *Holt*, in the county of *Norfolk*, certain goods and merchandizes, to wit, spirituous liquors, were about to be imported and brought into *Great Britain*, to wit, at, &c., from parts beyond the seas, in respect of which goods and merchandizes certain duties of customs would then and there be due and payable to

1828.

The KING *against* EVERETT.

it was the duty of *Richard Hooper*, as such person so employed in the service of the customs of our said lord the King as aforesaid, to arrest and detain all such goods and merchandizes as should within his knowledge be imported and brought into *Great Britain*, which upon such importation thereof would become forfeited to our said lord the King by virtue of any acts of parliament relative to his Majesty's customs then in force, and which would then and there be liable to be seized as forfeited as aforesaid, in order that such goods and merchandizes might be dealt with according to law, and that the defendant well knowing the premises, but having no regard for the laws and statutes of this realm, and unlawfully devising and intending to cheat and defraud our said lord the King in his said revenue of the customs, afterwards on, &c., with force and arms at, &c. did unlawfully and corruptly solicit him *Richard Hooper*, being such person so employed in the service of the customs of our lord the king as aforesaid, when certain goods and merchandizes should be imported and brought into this kingdom, which upon such importation thereof as aforesaid would become forfeited to our said lord the King, by virtue of certain acts of parliament relative to his Majesty's customs then in force, and which would be liable to be seized as forfeited as aforesaid, unlawfully and contrary to the duty of him *Hooper* as such person so employed in the service of the customs of our said lord the King, to forbear to arrest and detain the said last-mentioned goods and merchandizes, in order that the same might not be dealt with according to law, whereby our said lord the King might and would be then and there defrauded in his said revenue of the customs, in contempt, &c. At the Spring assizes for the

1828.

The King against Everett.

county of *Norfolk* 1828, the defendant was found guilty on the third count only, and *Kelly* on a former day in this term obtained a rule nisi for arresting the judgment, upon the ground that it did not appear in that count that *Hooper* was a person whose duty it was to make seizures of goods liable to forfeiture. On moving for the rule he contended (the allegation being merely that *Hooper* was a person employed in the service of the customs), that the law did not cast upon all persons in the service of the customs the duty of making seizures; and that although the 6 *G.* 4. *c.* 108. *s.* 34. enacted that goods liable to forfeiture might be seized by any officer of the army, navy, or marines duly authorized and on full pay, or officers of customs or excise, or any person having authority to seize from the commissioners of his Majesty's customs or excise; the count did not shew that *Hooper* was a person coming within any of the three classes described in that section. It ought to have shewn that *Hooper* was a person whose duty it was to make seizures.

The *Solicitor-General* and *Shepherd* now shewed cause. It sufficiently appears that *Hooper* was a person having

customs; for by the eighth section of 6 *G.* 4. *c.* 106. "every person employed on any duty or service relating to the customs, by the orders of the commissioners of his Majesty's customs (whether previously or subsequently expressed), shall be deemed to be the officer of the customs for that duty or service."

Lord TENTERDEN C. J. The objection must prevail. The count alleges that *R. Hooper* was a person employed in the service of the customs of our lord the King, and that it was his duty as such person so employed in the service of the customs of our said lord the King, to arrest and detain all such goods and merchandizes as should within his knowledge be imported into *Great Britain*, which upon such importation would become forfeited to our said lord the King by virtue of any acts of parliament, &c. The allegation that *Hooper* was a person employed in the service of the customs is an allegation of fact. The allegation that it was his duty to seize goods which upon importation were forfeited, is an allegation of matter of law. That being so, the fact from which that duty arose ought to have been stated in the count. If, indeed, it could be said to be the duty of every person employed in the service of the customs to seize such goods, then the allegation would have been sufficient. But it clearly is not the duty of every such person; as, for instance, it is not the duty of a porter employed in the service of the customs to seize such goods. The case of *Max* v. *Roberts* (*a*) is in point; there the count stated "that the defendants being owners of a ship at *Liverpool* bound

(a) 12 *East*, 89.

1828.

The King against Evans.

on a voyage from thence to *Waterford*, the plaintiff shipped goods on board to be carried upon the said voyage by the defendants, and to be delivered at *W.* to the plaintiff's assigns; and thereupon the plaintiff insured the goods at and from *L.* to *W.*, and then averred that it was the duty of the defendants, as such owners, to cause the ship to proceed on the voyage from *L.* to *W.* without deviation; and alleged a breach of such duty by their causing the ship to deviate from the course of that voyage, after which she was lost, with the goods; and the plaintiff, by reason of such deviation, lost his goods, and the benefit of his policy, &c.;" and it was held that the count could not be sustained. Lord *Ellenborough*, in delivering the judgment of the Court in that case, says, " The first count of the declaration alleges a shipment by the plaintiff of goods on board a vessel of which the defendants are stated to be owners; but it does not proceed to state that such goods were delivered to or received by the defendants, or that the defendants in any manner ever had notice of the fact of such shipment. So that in this count there is not only a want of any words importing a promise by the one party to the other, but there is also an entire absence of

1828.

The King *against* Everett.

customs, or a person having authority from the commissioners of the customs or excise. It is not averred that *Hooper* was a person coming within any of these classes. Neither is it averred that he was a person employed on the duty or service of making this seizure, so as to make him an officer of the customs for that duty or service within the statute 6 *G.* 4. *c.* 106. *s.* 8. The rule for arresting the judgment must be made absolute.

Rule absolute.

SAMUEL *against* The ROYAL EXCHANGE Assurance Company.

Tuesday, May 15th.

A vessel insured from *Sierra Leone* to *London*, and upon which the insurance was to endure until she had been moored in good safety twenty-four hours, arrived in the evening of the 18th of *February*, and the captain having orders to take her into the King's Dock at *Deptford*, moored her near the dock-gates. On the following morning he was informed at the dock, that no order for his admittance had been received; but that if it had, the vessel could not be then admitted, on account of the quantity of ice in the river. The order was sent by the Navy Board on the 21st, but on account of the ice, the ship could not be moved until the 27th, and then, in warping her towards the dock, a rope broke, she grounded, and was totally lost. The jury found that the vessel remained at her moorings from the 18th to the 27th of *February* on account of the ice, and not for want of an order to enter the dock: Held, that upon this finding, the plaintiff was entitled to recover, for that the place where the vessel was moored, not being the place of her ultimate destination, the policy did not expire when she had been there in safety twenty-four hours; and as the vessel remained at those moorings on account of the ice, and not waiting for the order, the underwriters were not discharged by the delay.

COVENANT on a policy of assurance at and from *Sierra Leone* to *London*, "on ship, called *Salmon River*, and freight, to begin at *Sierra Leone*, and endure upon the ship until she shall have arrived at *London* and hath there moored at anchor twenty-four hours in good safety, and upon the goods until the same be there discharged and safely landed." Averment, that whilst the vessel was proceeding on her voyage, and before she had been moored at *London* twenty-four hours, she grounded, and was wrecked and totally lost. Second count for a loss by barratry of the master. Plea, the general issue, according to the statute, that the corpor-

1828.

SAMUEL against The ROYAL EXCHANGE Assurance Co.

ation have not broken their covenants, or any of them. At the trial before Lord *Tenterden* C. J., at the *London* sittings after *Trinity* term 1827, it appeared that the *Salmon River* sailed from *Sierra Leone* for the port of *London* on the 3d of *December* 1826, laden with teak, and chartered to one *Lennox*, who had entered into a contract with the Navy Board, to supply them with a cargo of teak to arrive before the end of that month. On the 2d of *February* 1827, the vessel having received damage in a gale of wind, the captain put into *Dover*, and remained there under repair until the 13th of *February*. During that interval he came to *London* for orders, and *Lennox* directed him to take the ship into the King's Dock, at *Deptford*, and deliver her cargo there. In the afternoon of *Sunday* the 18th of *February* the vessel arrived at *Deptford*, and was moored alongside a King's ship, near the dock gates. On the following morning the captain made inquiries at the dock-yard respecting the admission of his ship, and was informed that no bills of lading had arrived, and there were no orders to admit her; but that she could not under any circumstances be then admitted on account of the quantity of ice in the river. The captain then went to *Lon-*

1828.

SAMUEL *against* The ROYAL EXCHANGE Assurance Co.

dock-gates, and was totally lost. It appeared also that many vessels laden with timber discharged their cargoes at the place where the *Salmon River* had been moored. Upon this evidence, it was contended for the defendants, either that the place where the *Salmon River* was moored must be considered as the place of her destination, in which case she had been in good safety for twenty-four hours before the loss, or that if it were not, the captain had remained there an unreasonable time, and consequently the underwriters were discharged. The Lord Chief Justice left it to the jury to say whether the *Salmon River* remained lashed to the King's ship waiting for an order to be admitted into the King's Dock, or whether she remained there because from the 18th to the 27th of *February* she could not have removed elsewhere for the purpose of delivering her cargo had the owner wished it, and directed them, if they thought she remained waiting for the order, to find for the defendants, otherwise for the plaintiff. The jury having found a verdict for the plaintiff, the *Attorney-General*, in *Michaelmas* term, obtained a rule nisi for entering a nonsuit, against which

Campbell, *Pollock*, and *Joshua Evans* shewed cause. The real question in this case is, what was the destination of the vessel? She could not be considered as moored twenty-four hours in good safety, until she had been for that space of time moored at the place where her cargo was to be discharged. Suppose the captain, in consequence of adverse winds, had anchored at *Gravesend*, and remained there twenty-four hours, it is clear that the underwriters would not have been discharged, although *Gravesend* is in the port of *London*. The only circum-

1828.

SAMUEL against THE ROYAL EXCHANGE ASSURANCE CO.

circumstance upon which any argument can be raised is, that on *Monday* the 19th of *February*, the order for admitting the *Salmon River* into the King's Dock had not arrived. If between the 18th and the 21st of *February*, when the order arrived, the river had been open, so that the ship might have proceeded on her voyage, the delay would have been unreasonable, and the underwriters discharged; but the jury have relieved the plaintiff from that difficulty, by finding that from the 18th to the 27th the state of the river was such that the vessel could not have been moved with safety.

Sir *J. Scarlett* and *Bosanquet* Serjt. contrà. The plaintiff in this case ought to have been nonsuited on two grounds. First, the ship was moored in good safety twenty-four hours before the loss. Secondly, the delay at *Deptford* was unreasonable, and the policy thereby rendered void. Had the captain arrived in the river destined to any particular dock, the underwriter would have remained liable until the vessel could by reasonable diligence be placed in that dock in good safety. But here the vessel was not destined to any particular part of the port of *London*. No doubt the captain

vessels frequently discharge their cargoes, it must be considered as the place of his destination, and then the vessel had been moored in good safety twenty-four hours before the loss.

Lord TENTERDEN C. J. Upon the whole, I am of opinion that this rule ought to be discharged. It has been contended, that his Majesty's dock at *Deptford* cannot be considered as the place of destination of the *Salmon River*. But upon the evidence, I think it was the place of her destination. The master was ordered to take her there, and he came up the river intending to go there. It is true that at that time he had no right to enter the dock, and it was quite uncertain whether permission to do so would be granted or not. He arrived in the evening of *Sunday* the 18th of *February*; of course he could not then go into the dock, and on the *Monday* he found that no orders for his admission had been received; and if at that time the vessel could have gone in, her detention at the moorings would have been improper, and the underwriters thereby discharged. That question of fact I left to the jury, and they found that the vessel did not remain at *Deptford* for want of an order to enter the dock, but because she could not be safely moved to any other part of the river. Another point made was, that the place where the vessel was moored must be considered as her place of discharge, because some vessels do in fact discharge their cargoes there. But it was manifest that there never was an intention to discharge her cargo there, the orders to the master being to take her into the King's dock. That ground of defence therefore fails; and as the delay would only be improper if the vessel could have gone to some other

1828.

SAMUEL against The ROYAL EXCHANGE Assurance Co.

other place of discharge in the river, I think that the plaintiff is entitled to retain the verdict found in his favour.

HOLROYD J. (a) It seems to me that the question is concluded by the finding of the jury, that the state of the river prevented the removal of the ship from the 18th to the 27th of *February*. Under such circumstances, there could be no improper delay, and there is no ground for considering the place where she was lying as the place of her ultimate destination.

LITTLEDALE J. concurred.

Rule discharged.

(a) *Bayley* J. had gone to Chambers.

Tuesday, May 13th.

BRAZIER *against* JONES.

In an action against the Marshal for an escape, the declaration alleged, that plaintiff and

THIS was an action against the Marshal of K. B. for an escape. The first count of the declaration stated, that before the committing of the grievances, &c. divers differences and disputes had arisen and were

1828.

BRAZIER *against* JONES.

order to put an end to them it was mutually agreed upon by and between plaintiff and *W. B.* that all the said matters in difference should be referred to certain persons, to wit, &c.; and thereupon in pursuance of such agreement plaintiff and *W. B.* on, &c. did by mutual bonds of submission, bearing date, &c. submit themselves to, and bind themselves to abide the award of the said, &c. concerning the said matters in difference under the terms and upon the conditions more particularly set forth in the respective conditions of the said bonds of submission. That the arbitrators afterwards, to wit, on, &c. did amongst other things award, that *W. B.* should pay to the plaintiff on, &c. the sum of 385*l.*, &c.; of all which premises *W. B.* had notice. And plaintiff for having performance of the award, procured the bond of submission entered into by *W. B.* to be made a rule of C. P. And because the award was afterwards, to wit, on, &c. so far as concerned the said *W. B.* wholly unperformed; and because the day assigned for payment of the said sum of money in the award mentioned had long since elapsed, the plaintiff on, &c. sued and prosecuted out of the C. P. a writ directed to the defendant, (*W. B.* then and there being in the custody of the defendant as Marshal of K. B.) commanding him to attach *W. B.* so that he might have his body before the justices of C. P. at *Westminster* on, &c. to answer, &c. And *W. B.* being and remaining in custody of the defendant as such Marshal, under and by virtue of the said attachment afterwards, to wit, on, &c. was duly brought before Sir *S. Gaselee*, Knight, then and now being, &c. at his chambers, &c. in his own person, in custody of the said defendant as such Marshal, by virtue of a writ of habeas corpus directed

to

1628.

BEASLEY against JONES.

to the defendant; and *W. B.* was then and there committed by Sir *S. G.* to the custody of the Warden of the Fleet in contempt, for the non-payment of the said sum of 385*l.*, &c. And *W. B.* being and remaining in custody of the said Warden afterwards, to wit, on, &c. was brought before Sir *J. Littledale*, Knight, then and now being, &c. at his chambers in, &c. in his own person in custody of the said Warden, by virtue of another writ of habeas corpus; and the said *W. B.* was then and there committed by the said Sir *J. L.* to the custody of the defendant as such Marshal as aforesaid, charged with the said contempt; and the defendant then and there took the said *W. B.* into his custody, &c. and afterwards, to wit, on, &c. voluntarily suffered and permitted him to escape. The second count stated, that *W. B.* on, &c. had been duly committed to the custody of the Warden of the Fleet by Sir *S. G.* in contempt for the non-payment of the sum of 385*l.*, &c. pursuant to the said award so made as aforesaid, and the bond of submission to the said award, and the condition thereunder written and entered into by the said *W. B.*; and the submission between the said plaintiff and the said *W. B.* mentioned in the said last-mentioned condition,

1828.

BRAZIER *against* JONES.

the submission would not appear to be mutual, and, consequently, the award could not be binding. The Lord Chief Justice reserved this point. It then appeared that the award was not made within the time originally limited, but there was an indorsement on the bond, bearing date before the expiration of that time, whereby it was enlarged, and the award was made within the enlarged time. This indorsement was proved to be in the hand-writing of the arbitrator, but no evidence was given of its being written at the time of its date. The Lord Chief Justice held that such evidence was not necessary, and the award was read. The plaintiff then gave in evidence a rule of C. P., making the submission a rule of court, the rule nisi and the rule absolute for an attachment, the issuing of the attachment, and the commitment of *W. B.* for the contempt, by a Judge at chambers, as alleged in the declaration, and the subsequent escape of the prisoner. For the defendant it was objected, that this commitment was illegal, for that it ought to have been by the Court, and not by a Judge at chambers. This point was reserved by the Lord Chief Justice; and, subject to the questions reserved, the case was left to the jury, who found a verdict for the plaintiff, with nominal damages. In *Michaelmas* term a rule nisi for entering a nonsuit was granted, against which

Sir *J. Scarlett* and *Patteson* shewed cause. It was not necessary for the plaintiff in this case to prove his execution of the bond of submission. All the allegations respecting those preliminary matters were unnecessary, and the declaration would have sufficed had it merely stated

1828.

BRAZIER against JONES.

stated the rule of court for an attachment, and the commitment upon it. The case of *Ferrer* v. *Owen* (*a*) was very different; the action was brought upon the award, and the plaintiff was bound to shew that the award was made upon sufficient authority. Here the proceeding is founded upon the judgment of the Court of C. P.; and, even supposing that judgment to have been wrong, the Marshal cannot be relieved on that ground. [*Bayley* J. There is not in this declaration any allegation of an application to the Court of C. P. for an attachment against *W. B.* for nonperformance of the award; there does not, therefore, appear to have been any adjudication upon which the writ of attachment issued. Lord *Tenterden* C. J. When you declare against the Marshal for an escape out of execution, you always state the judgment as well as the writ.] The first count certainly does not state any order of the Court for issuing the attachment, but it states that it *duly* issued; and the second count begins by stating that *W. B.* had been *duly* committed to prison. Now, sufficient evidence of a due commitment was given. All the rules of court were given in evidence, and as it was proved that the Court of C. P. had made an order for enforcing the award, the previous

1828.

BRAZIER against JONES.

Gurney and *Campbell* contrà. It is admitted, on the other side, that no sufficient evidence was given of the submission to arbitration, and it is very doubtful, whether the proof of the enlargement of the time was sufficient. The case of a petitioning creditor's debt is somewhat analogous, and that must be shewn to have existed at the time of the bankruptcy. Now, it was necessary for the plaintiff to shew how he had been damnified, in order to maintain an action against the Marshal; and as the declaration did not set forth any rule of court for the issuing of the attachment, it was incumbent on the plaintiff to prove the submission, in order to make out that he was entitled to have an attachment against *W. B.* Secondly, the commitment by a judge at chambers was illegal; and unless a party is lawfully in custody, no action lies against the Marshal for an escape, *Rogers* v. *Jones* (*a*). (They were then stopped by the Court.)

Lord TENTERDEN C. J. The first point is the only one upon which I propose to say any thing at present, viz. whether the plaintiff having averred, but not having given evidence of a mutual submission, failed to prove a material allegation. The answer given is, that the allegation was wholly unnecessary, and that sufficient remains if it be struck out, for that as against the marshal proof of the order of the Court of C. P. for the attachment was sufficient. If the declaration had commenced by a statement of that order, I should have been inclined to think it sufficient; but there is no allegation that the Court made an order for the at-

(*a*) 7 *B.* & *C.* 80.

1828.

BRASIER against JONES.

tachment. The averment is, that the plaintiff sued and prosecuted out of the Court of C. P. a writ, commanding the defendant to attach *W. B.*, so that it would appear to be the act of the party. Then it was urged that proof of the rule for the attachment sufficed, without proof of the mutual submission; according to which argument, want of proof of matter alleged is to be compensated by proof of matter not alleged. I think that would be a most dangerous doctrine. Suppose neither the thing averred nor the matter not averred were proved, still there could be no motion in arrest of judgment, for after verdict it would be assumed that all the allegations of the declaration had been proved. On this ground, I think that the rule for entering a nonsuit must be made absolute.

BAYLEY J. In an action for an escape, the plaintiff must aver and shew in evidence, not only the escape of the prisoner, but that he was previously lawfully detained. Here nothing analogous to a judgment is alleged, but certain other matters entitling the plaintiff to an attachment are shewn. Thus the award is stated, but that would not suffice unless made upon the mutual

HOLROYD J. Although if the rule of the Court of Common Pleas for the attachment had been made the foundation of the plaintiff's action, proof of it might have sufficed, still as that was not done, but other things were relied on in the declaration, the plaintiff was bound to give legal evidence of them.

LITTLEDALE J. It was in the option of the party to begin his declaration with the rule for the attachment, or to state the preliminary matters, and the issuing of the attachment, without mentioning the rule. I think that on a motion in arrest of judgment, either form would have sufficed. But here the question is not as to the form of the declaration, but as to the proof of the allegations. And this does not come within any of the cases as to omitting proof of superfluous allegations, for in all of them there was proof of the material things alleged. Here the evidence relied on was of a matter not alleged. Nor can the rule for the attachment be considered as evidence of the preliminary matters, for it appears to have been made upon reading certain affidavits, the contents of which were not shewn. There was no evidence that those affidavits related to the preliminary matters alleged; the rule, therefore, could not be proof of those matters.

Rule absolute.

1828.

Tuesday, May 13th.

LOVICK *against* CROWDER and Another, late Sheriffs of the City of LONDON.

In *March*, the then sheriffs of *London* seized the goods of a debtor by virtue of a fieri facias. An officer was put in possession of the goods; but the execution creditor directed the sheriffs not to sell, and the debtor continued to have the controul of his goods until *November*, when another execution creditor sued out a fieri facias, directed to the succeeding sheriffs of *London*: Held, that the latter were bound to

THIS was an action against the defendants for a false return to a writ of fieri facias issued against the goods of one *Harrison*. Plea, not guilty. At the trial before Lord *Tenterden* C. J. at the *London* sittings after *Trinity* term 1827, it appeared that the plaintiff, having recovered judgment against *Harrison*, sued out a fi. fa. against the goods of *Harrison* on the 2d of *November* 1825, and that the defendants, being at that time sheriffs of *London*, on the 12th of *November* returned nulla bona; that *Harrison* carried on the business of a wine-merchant in *Fleet Market*, and at the time when the writ was delivered to the defendants there were large quantities of wine on his premises. It appeared further, that down to the 2d of *November* 1825, the business was carried on on *Harrison's* account, the clerks or servants always accounting to him for the monies received. On the part of the defendants it was proved, that on the 31st of

fi. fa., had sued out a ca. sa. against *Harrison*; and that *Harrison*, having afterwards become bankrupt, he had proved his debt under the commission. Upon these facts it was conceded by the defendants' counsel, that *M'Nab* having allowed *Harrison* to have the controul of the property for so many months, the defendants, if they had been sheriffs of *London* at the time when the writ issued at the suit of *M'Nab*, would have been bound to take notice that the first execution was fraudulent, and to levy under the plaintiff's writ; but it was contended that they having come into office after *Harrison*'s goods had been seized under *M'Nab*'s execution, could not be presumed to have any knowledge of the facts attending that execution; and that finding an officer already in possession, they were not bound to make any enquiry. It was further contended, that the plaintiff had waived his right of action against the defendants, by suing out a ca. sa. against *Harrison*, and proving under his commission. Lord *Tenterden* C. J. directed the jury to find a verdict for the plaintiff for 259*l.* 1*s.* 9*d.*, the value of *Harrison*'s goods, and gave liberty to the defendants to move to enter a nonsuit. A rule nisi having been obtained by *Gurney* in last *Michaelmas* term,

Sir *J. Scarlett* and *Platt* now shewed cause. As soon as the first fieri facias was executed, and the officer of the sheriff was put in possession, the goods seized were in custody of the law; but as soon as the plaintiff (*M'Nab*) in that execution permitted *Harrison* to continue to have the controul of the goods, and to appear to the world as the owner, he assented that the goods, which for a time had been in custody of the law, should be restored to *Harrison*. They thereby again became

1828.

LOWICK against CROWDER.

Harrison's property, and the defendants, to whom a fieri facias was subsequently delivered, were bound to seize them. Although the defendants were not sheriffs at the time when the first execution issued, it was their duty to enquire of the officer in possession into the circumstances attending it; and if they had done so, they would have been informed of facts which rendered that execution null and void. Besides, in *London*, the secondary, who acts under different sheriffs in succession, has the execution of writs, and the defendants must through him have known all the facts. The plaintiff has not waived his right of action by suing out a ca. sa. and proving under the commission. A cause of action accrued to him by the defendants' breach of duty, and the plaintiff has not released it.

Gurney and *Comyn* contrà. There was no evidence to shew that the secondary was a permanent officer. Here the sheriffs, who seized under the first execution, remained continually in possession down to the time when the second execution took place. The goods were then in custody of the law. The defendants, who afterwards came into office, cannot be presumed to have

his person, and waved all right of action against the defendants.

1828.

LOVICK against CROWDER.

Lord TENTERDEN C. J. It seems to have been conceded at the trial, that if the same persons who filled the office of sheriff in *March*, when the first execution issued, had filled it in *November*, they would have been bound to levy; and, consequently, if the defendants had filled the office at those times, they would have been liable in this action. But it was said that the goods, having been seized by the former sheriffs, were in custody of the law, and that they could not, therefore, be seized by the defendants. It seems to me, that they were not in custody of the law at the time when the fieri facias at the suit of the plaintiff was sued out; they were in custody of the sheriff's officer by virtue of legal process fraudulently kept on. The first fieri facias was sued out returnable in *Easter* term. The sheriff was never ruled to return the writ, and he made no return. *Harrison* continued in possession, and carried on the business as usual so far as his failing circumstances permitted. When the plaintiff's writ came to the defendants, and they found the officers of the former sheriffs in possession, it became their duty to enquire by what authority they were there. I think the law does impose on a sheriff the duty of making such enquiry. The possession of the former sheriff is no more than the possession of any third person would be under a bill of sale (*a*). Now, if a party be in possession of goods apparently the property of a debtor, the sheriff, who has a fieri facias to execute, is bound to enquire whether

(*a*) *Prec. in Cha.* 286, 287.

1828.

LOVICK against CROWDER.

the party in possession is so bonâ fide; and if he find the possession is held under a fraudulent bill of sale, he is bound to treat it as null and void, and levy under the writ. The rule for entering a nonsuit must be discharged.

BAYLEY J. There cannot be any doubt that these goods were liable to the plaintiff's execution. Where a plaintiff sues out execution, and seizes under a fieri facias the goods of his debtor, and suffers them to remain long in the debtor's hands, a subsequent execution creditor may treat the goods as the goods of the debtor. The only question is, does the change of sheriff make any difference? Being apparently the goods of *Harrison*, the defendants ought, primâ facie, to have seized them (*a*). But it is said that they ought to have forborne seizing them, when they found the officer of the late sheriffs in possession. I think, however, that it was the duty of the defendants to ask to see the warrant; and if they had done so, they would have found, from the date of the warrant, that there had been gross delay, and then they would have been bound to treat the first execution as fraudulent and void, and to have seized the goods. But it is said that the sub-

1828.

LOVICK against CROWDER.

HOLROYD J. I think the plaintiff's right of action, if he had one, is not destroyed. The goods were not in custody of the law at the time when the second execution issued. They were originally the goods of *Harrison*; and the first execution by *M'Nab* being wholly null and void, they remained the goods of *Harrison*, notwithstanding that execution, and were liable to be seized by the plaintiff, or any subsequent execution creditor.

Rule discharged.

The KING *against* The Justices of MONMOUTHSHIRE.

Where, upon an appeal against an order of removal, the justices at sessions were equally divided, and made an order, that the hearing of the appeal should be adjourned; one of the justices, who voted in favour of the respondent parish, being a rated inhabitant of that parish. An application for a certiorari to remove the order of sessions, in order that it and the original order of removal might be quashed, was refused, on the ground that, even if the order of sessions were erroneous, this Court had no jurisdiction to review it.

A RULE nisi had been obtained for a certiorari to remove into this Court an order of two justices of the county of *Monmouth*, for the removal of *James Lewis*, his wife and family, from the town of *Usk* to the parish of *Langwm Ucha*, and all orders of sessions made thereon or in relation thereto, in order that the order of removal, and *also an order of sessions for adjourning the hearing of the appeal against the same order, might be quashed.* It appeared by the affidavits, that, on the hearing of the appeal at the *Epiphany* sessions 1828, there were four magistrates present. One of these was the removing justice, and a rated inhabitant for the relief of the poor of the town of *Usk*. He and one other of the magistrates voted for the respondents, and the other two justices for the appellants. The chairman announced that the court were equally divided. The counsel for

the

1828.

The King against The Justices of Monmouthshire.

the appellants moved the court to quash the order of removal, on the ground that the respondents had not made out their case. But the court made an order that the appeal should be adjourned.

Russell Serjt. and *Watson* now shewed cause. This Court is not a court of error to review the judgment of the court of quarter sessions. It is true, that, in *Rex* v. *Gudridge* (*a*), it was held that a magistrate, a rated inhabitant of the parish, ought not to vote on the determination of an appeal against an order for the allowance of overseers' accounts, or even on a question as to granting a case for the opinion of this Court. But in that case this Court only decided, that, under the circumstances, the writ of certiorari ought not to have issued for removing into this Court an order of sessions made under such circumstances. In *Rex* v. *The Justices of Leicestershire* (*b*), the Court refused to grant a mandamus to the justices at sessions to hear an appeal against an order of removal, after judgment given by them and entered by the clerk of the peace for quashing the order, the application being made on the ground that justices at sessions were divided in opinion, and

[redacted]

1828.

The KING *against* The Justices of MONMOUTHSHIRE.

majority of the court, quashed the order of removal. The sessions having decided the case, this Court refused to grant a mandamus, on the ground that this Court was not a court of error from that court; that it might compel the court of quarter sessions by mandamus to hear and decide the appeal, but when they had so determined it, this Court could not compel them to correct their judgment if it appeared to be erroneous.

Campbell and *Maule* contrà. It must be conceded that this Court is not a court of error to review the decisions of the court of quarter sessions; but here the court of quarter sessions have made the order of adjournment without having any jurisdiction so to do. There were two good votes in favour of the appellants, and only one good vote in favour of the respondents. The vote of the magistrate who was interested was a nullity, *The Parish of Great Charte* v. *Kennington* (*a*), *Rex* v. *Yarpole* (*b*), the case of *Foxham Tything* (*c*). And if that be so, then the only judgment which the court had jurisdiction to pronounce, was, that the order of removal be quashed.

Lord TENTERDEN C. J. This rule must be discharged. But I wish to have it clearly understood that in doing so we do not in any degree intend to sanction a magistrate's voting in any case in which he is interested. This is an application to the Court to quash an order of sessions made for adjourning an appeal, on the ground that upon the question whether the order of removal should be confirmed, the justices were equally

(*a*) 2 *Str.* 1173. (*b*) 4 *T. R.* 71. (*c*) 2 *Salk.* 607.

divided

1828.

The King against The Justices of Monmouthshire.

divided in fact, though it is alleged that, in point of law, two were for quashing the order, and one only for confirming it; because it is contended that the vote given by one of the justices for confirming the order was a nullity, and therefore the sessions ought to have quashed the order of removal, and not to have adjourned it. The late decisions establish, however, that we cannot assume to ourselves the jurisdiction of a court of error, and revise the judgments of the court of quarter sessions. It is said that the court of quarter sessions, under the circumstances, had not jurisdiction to make the order of adjournment. It is clear that it had jurisdiction to make any order concerning the subject matter of the appeal, and, among others, the order that the hearing of the appeal should be adjourned. In *Rex* v. *Gudridge*(*a*), the rule which had been obtained was not to review the order of the court of quarter sessions, but to quash a writ of certiorari quia improvide emanavit. The question before the Court in that case was, whether that writ ought to have been allowed to issue to remove an order of sessions made under circumstances nearly similar to those in this case. And this Court thought that the writ of certiorari ought not to have issued. Here a judg-

1828.

BUSZARD and Others, Assignees of JONES and Another, Bankrupts, *against* CAPEL and Another.

Wednesday, May 14th.

TROVER for two barges; first count on the possession of the bankrupt, second count on the possession of the assignees. Plea, not guilty. At the trial before Lord *Tenterden* C. J. at the *London* sittings after *Trinity* term 1827, the jury found a verdict of not guilty on the first count; and on the second a special verdict, stating, as to the grievances in that count mentioned, that, at the time of making the distress thereinafter mentioned, *W. R. Jones* and *G. Jones* had become bankrupts, and the plaintiffs had been chosen and appointed their assignees; that the plaintiffs, as such assignees, before and at the time of the making of the distress thereinafter mentioned, were lawfully possessed, as of their property as such assignees, of the barges thereinafter mentioned to have been taken and distrained by the defendants; and that by an indenture dated the 9th of *March* 1816, and made before *W. R. Jones* and *G. Jones*, or either of them, became bankrupts, between one *T. Brown* of the one part, and the bankrupts of the other part, *Brown* demised, leased, &c. to the bankrupts all that wharf, ground, and premises next the river *Thames*, and also

It was stated in a special verdict, that by an indenture *A.* demised to *B.*, all that wharf next the river *Thames*, described by abutments, together with all ways, paths, passages, easements, profits, commodities, and appurtenances whatsoever to the said wharf belonging; and that by the indenture the exclusive use of the land of the river *Thames* opposite to and in front of the wharf, between high and low water mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf, but that the land itself between high and low water mark was not demised: Held, that the meaning of this finding either was, that the land was demised as appurtenant to the wharf, and then it would be a finding that one piece of ground was appurtenant to another, which in law could not be; or, that the mere use of the land passed by the indenture, and that was a mere privilege or easement, out of which rent could not issue, and consequently, that the lessor could not distrain, for rent in arrear, barges, the property of *B.*, lying in the space between high and low water mark, and attached to the wharf by ropes.

all

1628.

BUSSARD against CAPEL.

all that capital brick built warehouse of three floors erected and built thereon, abutting north on the river *Thames*, east on premises in the occupation of *T. Flockton*, south on the street cartway and common highway leading from *Pickle Herring Stairs* to *Horsley Down Stairs*, and west on the *Five Footway* or *Little Wharf* for landing goods, and certain other premises in the indenture more particularly mentioned, together with free liberty for them the bankrupts, their executors, &c. during that demise, to land and load goods, &c. in common with the rest of the tenants of *Brown*, at the said *Five Footway* or *Little Wharf* fronting the river *Thames*, together with all cellars, ways, paths, passages, lights, easements, profits, commodities, and appurtenances whatsoever to the said wharf, ground, warehouse, and premises, or any of them, belonging or appertaining; habendum, the same premises, with their and every of their appurtenances, unto the bankrupts, their executors, &c., from the 25d *March* then past for the term of thirteen years, at the yearly rent of *555l.*, by equal quarterly payments, payable to *Brown*, and after his death to the person who should be entitled to the freehold of the premises. The special verdict then stated, that by the indenture the ex-

1828.

BUSSARD *against* CAPEL.

were attached by ropes head and stern to the wharf ground aforesaid, and were lying and being on that part of the river *Thames* opposite to and in front of the said wharf ground and premises, and between high and low water mark, the exclusive use of which was demised as aforesaid; that the defendants on the said 12th *November* as the bailiffs of the person who was then entitled to the freehold of the wharf and premises, and was duly authorized by law to distrain for the arrears, seized and took the two barges as a distress for the arrears of rent, and shortly afterwards sold and disposed thereof to satisfy such arrears. This case was argued on a former day in this term by

Richards for the plaintiff. The defendants could not by law distrain the barges while they were between high and low water mark, because a distress can only be made on the land out of which the rent issues, and here the rent did not issue out of the land between high and low water mark. That land was not demised, but only an exclusive right to use it. That was a mere easement. In *Co. Litt.* 47. *a.* it is said, "that it appeareth by *Littleton* that a rent must be reserved out of the lands or tenements whereunto the lessor may have resort or recourse to distrain, as *Littleton* here also saith; and, therefore, a rent cannot be reserved by a common person out of any incorporeal inheritance, as advowsons, commons, offices, corodie, mulcture of a mill, tithes of fairs, markets, liberties, *privileges*, franchises, and the like. But if the lease be made of them by deed for years, it may be good by way of contract to have an action of debt, but distrain the lessor cannot." Here the land between high and low water mark is not demised, but a mere right to use it. That is a privilege or easement,

and,

1828.

BOSSARD against CAPEL.

and, consequently, no rent can issue out of it. The 11 *G.* 2. *c.* 19. *s.* 8. enables the landlord to distrain any cattle feeding upon a common appurtenant to the land demised. At common law such cattle could not be distrained, because the soil of the common belonged to the lord of the fee; and the lessor of the land (to which the right of common is appurtenant) could not, therefore, enter on the common land to distrain. So, in this case, the soil of the land between high and low water mark belongs to the king. The lessor of the wharf, therefore, can have no right to distrain on that land, though he may have, as appurtenant to his land, an exclusive right to use the space between high and low water mark. There are cases where land having been demised for a term of years, and the lessee having had reserved to him a right of using part of the demised premises after the expiration of the term, his crops have been held to be subject to distress so long as they continued on the land, as in *Boraston* v. *Green* (*a*), and *Knight* v. *Benett* (*b*). But in those cases the land itself on which the distress was made was originally demised, and not the mere use of it, as in this case.

rule is only that land shall not be appurtenant to land. In *Co. Litt.* 121. *b.* it is said that prescription doth not make any thing appendant or appurtenant, unless the thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant; as a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. Mr. *Butler* in his note to this passage, after adverting to some examples to shew that this position is not universally true, says, "The true test seems to be the propriety of relation between the principal and the adjunct, which may be found out by considering whether they so agree in nature and quality as to be capable of union without any incongruity. In this case the principal is the wharf; the exclusive right to use the land between high and low water mark is the adjunct. They agree in nature and quality, so as to be capable of union without any incongruity; one, therefore, may be appurtenant to the other, and yet not be incorporeal.

But assuming this to be an incorporeal interest, the same remedies are applicable to the recovery of it, and the same consequences of law attach on the demise of it, as upon that of the corporeal principal. It is an interest for the recovery of which an assize of novel disseisin would lie at common law. That is a writ of entry wherein *A.* complains that *B.* hath disseised him of his freehold, and the sheriff is to cause that *tenement* to be reseised, and twelve men to view that tenement, &c. (*a*) *Bracton*, in his chapter on the *Assize of Novel Disseisin*, lib. iv. fol. 164., says, "Locum autem non solum habet hujusmodi assisa in rebus corporalibus sicut in *tenementis*

(*a*) *Fitz. N. B.* 177.

1828.

BUSSARD against CAPEL.

quibuscunque; verum etiam in rebus *incorporalibus* sicut *in servitutibus et in rebus quæ pertinent ad tenementum* sicut in jure pascendi, falcandi, fodiendi et hujusmodi." And again in fol. 176. "In quibus casibus omnibus subvenitur disseysito per breve de ingressu secundam formas inferius notandas, tam super possessionibus rerum corporalium, quam super juribus scilicet rebus incorporalibus sicut super jure pascendi et hujusmodi utendi fruendi." Here the lessee had the jus utendi, for he had the exclusive right of using the land between high and low water mark. Again, wherever a view could be had of tenements among which are servitutes, an assize lay for the recovery of the rent, and even a distress might be made upon a servitus for the rent of the servitus, provided it were practicable, *Bracton*, lib. iv. fol. 181. It has been said that assize lay in these instances only because it was a speedy remedy; but *Bracton*, lib. iv. fol. 181., says that it lies only where strictly applicable; and, therefore, if the complainant is ignorant of or cannot describe his tenement either in quality or quantity, or its local situation, the writ of assize of novel disseisin will not lie. The remedy by assize of novel disseisin was extended by the statute of *Westminster* 2d. Lord *Coke*, in comment-

And *Bracton*, when he mentions the writ of entry ad terminum qui præteriit, lib. iv. fol. 324., asserts, that it will lie for common of pasture dum tamen pastura fuerit certa et designata ad certum numerum averiorum. These writs of entry therefore are applicable, the one to that interest in land stated in the special verdict, the other to that right of common which the same interest is admitted to resemble.

Secondly, The same consequences attach upon the demise of it as upon that of the corporeal hereditament. The lessee has acknowledged under his hand and seal that this appurtenant is part of the premises demised in respect of which the rent is reserved. The power of distress is incident to and inseparable from rent service, and to that power there are no stricter limits than the following, which are given in *Fleta*, lib. ii. c. 49., "In qualibet captione tria principaliter requiruntur, certus locus, certa causa, et seisina alicujus." In the present case all these three requisites concur. *Littleton*, sect. 58., does not confine the right of distress to lands, but says, "If the lessor reserve to him a yearly rent upon such lease, he may chuse for to distrain for the rent in the *tenements letten*." Lord *Coke*, in commenting on this passage, says, that the rent must be reserved out of the lands or tenements whereunto the lessor may have resort to distrain. The reason given by Lord *Coke*, therefore, why the rent should be reserved out of the lands and tenements is, that there should be a certain place to distrain upon. He afterwards proceeds to say that a rent cannot be reserved by a common person out of an incorporeal inheritance; as tithes, &c.; but if lease be made of them by deed for years, it may be good by way of contract to have an action of debt, but distrain the lessor cannot."

1828.

BOSWARD against CAPEL.

This dictum, that it is good by way of contract only, is at variance with what was said by the Court in *Bally* v. *Wells* (*a*), where tithes were held to be such an estate as would create a privity between the lessor and assignee, so as to make the latter liable upon a covenant running with the tithes. There it was objected, tithes were incorporeal, and could not support a covenant by the lessee thereof to run with them, so as to bind the assignee. But the Court, in delivering judgment, say, "there seems to be no difference between an inheritance in *lands* and tithes as to this matter. Tithe is a tenth part of the profits of the *lands*; the profit of the land is the land itself; tithes are tangible and visible; may be put in view in an assize; an ejectment lies of them; a præcipe quod reddat lies of a portion of tithes; a warranty may be annexed to incorporeal inheritances. They have every property of an inheritance in land except that they lie in grant, and not in livery." Those observations apply obviously to the nature of the interest which the lessee took in the space between high and low water mark. Again, beasts upon the common might, at common law, be distrained for the rent of the common. In the Year-book 26 *Hen.* 8. p. 5., this case is stated, "In replevin defendant avowed that plaintiff

had said." In *Gray's* case (*a*) it was resolved that the lord might distrain cattle for the rent of the common on a common, although there was no prescription to distrain. In *The Mayor of Northampton's* case (*b*), *Lee* C. J. seems to have thought that the owner of the soil might distrain even for stallage, provided the sum were fixed. These authorities shew that there may be a distress for rent issuing out of an interest analogous to that which the lessee took under the indenture in the space between high and low water mark. The exclusive use found by the jury was inferred from those acts of enjoyment of which this soil is capable, such as making beds for the barges, clearing out the mud, &c. The interest of the tenant may be likened to the vesture of land, which may be distrained upon, *Co. Litt.* 47. *a.*; or to those particular rights for any injury to which trespass will lie, as a right to the herbage; or a piscary, *Co. Litt.* 4. *b.*, *Wilson* v. *Mackreth* (*c*), *Welch* v. *Myers* (*d*). These barges, although not "in and upon" the wharf ground, would have had no certain local habitation but for the wharf ground to which they were attached. If these barges were lawfully distrained, when the privilege of being so attached only was demised (as the Court of Common Pleas decided in this very case (*e*),) à fortiori, a distress of them is lawful when in the occupation of the interest stated in this special verdict. They occupied the premises demised according to the mode of occupation of which they were capable.

Richards in reply. The soil between high and low water mark did not pass by the indenture, but the mere right to use it. The land which did pass is described

(*a*) 5 *Coke*, 78. *S. C. Cro. Eliz.* 405. (*b*) 1 *Wils.* 115.
(*c*) 3 *Burr.* 1824. (*d*) 4 *Campb.* 368. (*e*) 4 *Bingh.* 137.

 by

1828.

BUSZARD *against* CAPEL.

by metes and bounds. Coupling the words of the deed with the finding of the jury, the lessee had a mere easement in the soil between high and low water mark.

Cur. adv. vult.

Lord TENTERDEN C. J. It is difficult to understand what is really meant by that part of the finding of the jury, "that the exclusive use of the land of the river *Thames* opposite to and in front of the said wharf ground between high and low water mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the said wharf ground and premises; but that the land itself between high and low water mark was not demised." And it is difficult to understand how the exclusive use could be demised and the land not; but in either case the distress cannot be supported. If the meaning of this finding be that the land itself was demised as appurtenant to the wharf, that would be a finding that one piece of land was appurtenant to another, which, in point of law, cannot be. If, on the other hand, the meaning be that the use and enjoyment of this land passed as appurtenant, that would be a mere privilege or easement, and the rent would not issue out of that; the landlord, therefore, could not distrain there for rent issuing out of the land in respect of which the easement or privilege had its existence. That is understood to be the law of the land, and an act of parliament was passed to remedy this inconvenience as far as rights of common were concerned. Taking the finding of the jury in either sense, the defendant had no right to distrain on the premises in question, and the judgment of the Court must be for the plaintiffs.

Judgment for the plaintiffs.

1828.

The Archbishop of CANTERBURY *against* TAPPEN.

Friday, May 16th.

An administrator is not, by the condition of the bond, given in pursuance of the statute of distributions, 22 & 23 *Car.* 2. *c.* 10., bound to distribute the surplus of the intestate's estate after payment of debts, &c., until a decree directing him so to do has been made by the court into which his inventory and account has been exhibited.

DEBT on bond dated 10th *May* 1809. The defendant craved oyer of the bond, by which he, one *R. E.*, and Sir *T. H. Page* were jointly and severally bound to the plaintiff in the sum of 12,000*l.* in pursuance of the statute of distributions. He also craved oyer of the condition, which was, that Sir *T. H. Page*, next of kin, and administrator of *B. W.* deceased, should make a true and perfect inventory of the goods, chattels, and credits of the deceased, and exhibit the same into the registry of the prerogative court of *Canterbury*, on or before the last day of *November* then next, and the same goods and chattels should well and truly administer according to law. And further, that he should make, or cause to be made, a true and just account of his said administration, at or before the last day of *May* 1810; and all the rest and residue of the said goods, chattels, and credits which should be found remaining upon the said administrator's accounts (the same being first examined and allowed of by the judge or judges for the time being of the said court), should deliver and pay unto such person or persons respectively, as the said judge or judges, by his or their decree or sentence, pursuant to the true intent and meaning of an act of parliament (entitled "An Act for the better settling of intestates' estates"), should limit and appoint. And that if any will of the deceased should afterwards be exhibited and proved, he would deliver the said letters of administration into the

1828.

Archbishop of CANTERBURY *against* TAPPEN.

said court. Plea, that Sir *T. H. Page* did make and exhibit into the registry of the prerogative court before the last day of *November* next ensuing the day of the date of the bond, to wit, on, &c., a true and perfect inventory of the goods, chattels, and credits of the deceased, and the same did well and truly administer according to law; and did make a true and just account of his said administration before the last day of *May* 1810, to wit, on, &c., and that the judge or judges for the time being of the said court have not, at any time hitherto, by his or their decree or sentence, pursuant to the true intent and meaning of the said act of parliament in the condition mentioned, or otherwise, limited or appointed the said Sir *T. H. Page* to deliver or pay all or any of the goods, &c. remaining upon the said administrator's accounts unto any person or persons whomsoever. But on the contrary, he was on, &c. cited to appear before Sir *J. N.*, commissary of the said court, on, &c., to exhibit an inventory and render an account; that he did appear, and such proceedings were thereupon had, that on, &c. he was dismissed from all further observance of justice in the said cause; and that it hath not at any time hitherto appeared that there was, or is, any will of the deceased; and this defendant is ready to verify, wherefore, &c. Second plea similar, with the exception that the citation and other proceedings in the prerogative court were omitted. The replication assigned as breaches, first, that Sir *T. H. P.* did not exhibit a true and perfect inventory, upon which issue was joined; secondly, that *B. W.* died intestate, leaving Sir *T. H. P.*, *A. P.*, *S. O.*, &c. her next of kin; that after the death of *B. W.*, and before the 1st of *January* 1820, out of certain goods and chattels which came

to

to his hands, Sir *T. H. P.* paid all the debts, &c. of *B. W.*, and that 10,000*l.* remained over and above in the hands of Sir *T. H. P.*, as administrator, which ought, according to the condition of the bond, to have been well and truly administered by Sir *T. H. P.* according to law; that is to say, in manner following; that is to say, (&c.); yet that Sir *T. H. P.* hath not well and truly administered the said last-mentioned goods and chattels, or any part thereof, according to law, or paid or delivered or divided the same in manner aforesaid, or otherwise howsoever. Rejoinder, that the judge or judges for the time being of the said court have not at any time by his or their decree limited and appointed Sir *T. H. P.* to distribute the said last-mentioned goods and chattels in the manner mentioned in the breach, or to any other person or persons whomsoever. Demurrer and *joinder.*

The case was argued on a former day in this term by *Chitty* for the plaintiff, and *Platt* for the defendant; *Devey* v. *Edwards and Tappen* (*a*) and *The Archbishop of Canterbury* v. *Howse* (*b*) were cited for the plaintiff, and *The Archbishop of Canterbury* v. *Willis* (*c*) and *Greenside* v. *Benson* (*d*) for the defendant; and now the judgment of the Court was delivered by

Lord TENTERDEN C. J. This is an action upon a bond executed to the plaintiff, on the grant to Sir *T. H. Page*, of letters of administration to the effects of *Blanch Woollaston.* The defendant has prayed oyer of the bond and condition, and they are set forth at length upon the record. The bond is dated on the 10th of

(*a*) 3 *Add. Ecc. Rep.* 68.
(*b*) *Cowper*, 140.
(*c*) 1 *Salk.* 315.
(*d*) 3 *Atk.* 248.

May

1828.

Archbishop of Canterbury against Tappen.

May 1809, and by the terms of the condition the bond is to be void,

First, If the administrator make a true and perfect inventory of the goods, &c. of the intestate, and exhibit the same into the registry of the prerogative court on or before the 10th day of *November* then next ensuing; and,

Secondly, If he well and truly administer according to law the same goods, &c. and all other goods, &c. that shall come to his hands; and,

Thirdly, If he do make a true and just account of his said administration on or before the last day of *May* 1810; and,

Fourthly, If he shall deliver and pay all the rest and residue of the goods, &c. which shall be found remaining upon his accounts unto such persons respectively as the judge of the court shall by decree or sentence, pursuant to the statute 22 & 23 *Car.* 2. *c.* 10. for the better settling of intestates' estates, limit and appoint; and,

Fifthly, If he deliver the letters of administration into court, in case any will of the deceased shall appear.

The defendant then pleads affirmatively, that the administrator performed the first three branches of the condition; and as to the fourth branch, that the judge

1828.

Archbishop of CANTERBURY against TAPPEN.

such proceedings were had in the court, that he was duly dismissed from all further observance of justice in the cause.

To this plea, the plaintiff has by replication alleged and assigned, as a breach of the condition, that certain persons particularly named were the only next of kin of the intestate; that the administrator paid all her debts; that goods of great value, and more than sufficient to pay all debts and charges of the administration, came to the hands of the administrator, which ought, according to the condition, to have been duly administered by him according to law; that is to say, in manner following, to wit, by paying certain sums specified in the replication to the persons before mentioned as the next of kin, whereof the administrator had notice; that a reasonable time for doing this has elapsed, yet the administrator has not administered the goods according to law, or paid or delivered the *goods*, or any part thereof, to the persons before named, or either of them, but neglected and refused so to do, contrary to the effect of the condition, whereby the persons before named have lost the use and profit of their proportions of the goods, &c. To this part of the replication the defendant has rejoined, that the judge of the court has not, by decree or sentence, limited and appointed the administrator to deliver or pay the goods to the persons named, or any other person. And upon this there is a demurrer by the plaintiff, and a joinder in demurrer.

The question of law, therefore, is, Whether the neglect or refusal of the administrator to distribute the surplus or residue of the effects of the intestate among the next of kin, according to the statute of distributions, without the previous decree or sentence of the court, be a breach of the condition of the bond?

The

1828.

Archbishop of Canterbury against Tapper.

The question is not, Whether such a neglect or refusal be a breach of the duty of the administrator, but whether it be a breach of the condition of the bond? And we are all of opinion that it is not. The question does not appear to have been directly decided in any court. According to the report of the proceedings before Sir *John Nichol* (*a*), on the application to allow the bond to be put in suit, that very learned judge appears to have thought, that this neglect might be a breach of the condition, but his attention was not particularly directed to this point; the great contest before him being, whether the sureties ought to be charged under the particular circumstances that had taken place; and it is obvious, from some parts of his judgment, that he would have thought it right to allow the next of kin to try this or any other doubtful question in a court of law, by an action on the bond, which could not be brought without the permission of the court.

This form of an administration-bond is given by the statute 22 *Car.* 2. *c.* 10., the first statute which ordains the distribution of the effects of an intestate among the next of kin. And the bond is obviously intended to secure a performance of what the statute ordains. We

1828.

Archbishop of CANTERBURY *against* TAPPEN.

by which he is required thus to administer, precedes the clause by which he is required to make a true account of his said administration, and this, also, precedes the clause by which he is required to deliver and pay the residue which shall appear upon his account to such persons as the court shall, according to the statute, appoint. Let us, then, see how the order and course of proceeding, thus marked out in the condition of the bond, agrees with the statute.

Now the statute first requires all ordinaries, as well the judges of the prerogative courts of *Canterbury* and *York* as all other ordinaries and ecclesiastical judges having power to grant administration, to take bonds with sureties in the form afterwards set forth. It then enacts, that such bonds shall be good, and that the said ordinaries and judges may proceed and call administrators to account touching the goods, and, upon hearing and due consideration, order and make just and equal distribution of what remaineth clear (after debts and charges paid) among the wife, children, &c. according to the laws in such cases, and the rules and limitations thereinafter set down; and the same distribution to decree and settle and compel the administrators to observe and pay the same by the due course of his Majesty's ecclesiastical laws. The statute then enacts (section 5.), that all ordinaries and every other person who by this act is enabled to make distribution of the surplus shall distribute the whole surplus in manner following; and then mentions the different degrees of kindred and persons to participate in different cases, and their shares; and then, to the end that a due regard may be had to creditors, it enacts that no distribution shall be made until a year after the death

of

1828.

Archbishop of Canterbury against Tapper.

of the intestate, and that every one to whom distribution shall be made shall give bond, with sureties, in such courts, to repay to the administrator a rateable part of debts that may afterwards appear, and of the costs of suit and charges that he may be put to by reason of such debts.

The word person in the fifth section of the statute evidently means judge; and from this view of the statute, it appears that the ordinary or judge is to make the distribution among the persons entitled, and that the administrator is to pay according to the sentence of the ordinary, so that the sentence of the ordinary is to precede the payment. And this may in many cases be necessary for the information and protection of the administrator, who, where the claimants are numerous and remote in kindred from the intestate, may not know with certainty what particular persons are entitled, or in what proportions, and may, if he pays to a person not entitled, be obliged to pay over again to the person legally entitled. And if the administrator has a right to have the sentence of the court before he pays, then, inasmuch as such sentence is only to be pronounced upon the residue of the effects, and after the admi-

1828.

Archbishop of CANTERBURY against TAPPEN.

act faithfully, and the claims of the next of kin can be, as in general they may be, ascertained without difficulty, he will not put them to the expence and delay of calling for his account, and obtaining the sentence of a court; and, therefore, it may well be said that it is his duty to make the distribution, although it cannot be said that a forfeiture of the bond is incurred if this be not done.

This construction of the bond agrees with the opinions expressed by Lord Chief Justice *Holt* and by Lord *Hardwicke*. If the words *well and truly administer according to law* import a distribution of the residue among the next of kin, they must, à fortiori, import a payment of debts out of the proceeds of the effects. But in the case of the *Archbishop of Canterbury* v. *Willis* (*a*), *Holt* C. J. says, "Whereas by the words of the condition he is to administer well and truly, that shall be construed in bringing in his account, and not in paying the debts of the intestate; and, therefore, a creditor shall not take an assignment of the bond and sue it, and assign for breach the nonpayment of a debt to him." And in *Greenside* v. *Benson and Others* (*b*), which was a suit arising out of an action at law on a bond, in which the breach assigned was the not bringing in a true and perfect inventory, Lord *Hardwicke* says, "What the counsel for the plaintiff aim at would have been right, supposing the ordinary had assigned for breach the nonpayment of the creditor's debts."

For these reasons, and upon these authorities, we think the breach to which the demurrer applies is not well assigned, and that the judgment must be given for the defendant.

Judgment for the defendant.

(*a*) 1 *Salk.* 315. (*b*) 3 *Atk.* 248.

1828.

Friday, May 16th.

NOTLEY and Others, Assignees of the Estate and Effects of ELIAS JARMAN, Bankrupt, *against* BUCK, Esquire.

Where a creditor obtained judgment by nil dicit against a trader, and thereupon issued a fi. fa., under which the sheriff seized the goods of the trader, who afterwards, and before the goods were sold, committed an act of bankruptcy, upon which a commission issued, and he was duly declared a bankrupt, of which the sheriff had notice, but nevertheless sold the goods, and paid over the proceeds to the execution-creditor. Held,

THIS was an action for money had and received, brought to recover from the late sheriff of *Devon* the produce of two executions levied by him upon the goods and chattels of the bankrupt. At the trial before *Park J.* at the Spring assizes for the county of *Devon*, 1827, a verdict was found for the plaintiffs, damages 1051*l.*, subject to the opinion of this Court on the following case: —

On the 30th of *May* 1826, *Rickman* and *Webber* obtained judgment as of *Trinity* term, 7 *G.* 4., against *Jarman*, a tanner, in the Court of Common Pleas, by nil dicit, for 800*l.* debt, and 6*l.* 13*s.* damages, in an action upon a bond dated 14th *December* 1819. On the 31st of *May* 1826 a writ of fi. fa. issued upon this judgment, directed to the sheriff of *Devon*, returnable on the 7th of *June*, indorsed to levy 437*l.* On the same

whereof was liable for excise duty. On the 9th of *June* 1826, whilst the said goods and chattels remained unsold, in the possession of the defendant as such sheriff, under the said writs of fi. fa., and also an extent at the suit of his Majesty for 68*l.* 15*s.* 7½*d.* for excise duty due from *Jarman* to his Majesty, *Jarman* committed an act of bankruptcy, upon which a commission of bankrupt issued on the 24th of *July*, and on which he was declared a bankrupt on the 9th of *August*, and the plaintiffs were afterwards duly appointed his assignees. On the 12th of *August* 1826, the defendant, as such sheriff, having notice of the said bankruptcy, sold the goods and chattels so seized, and after satisfying the extent, paid over the net proceeds of such sale, amounting to the sum of 1051*l.*, to the respective creditors, at whose suit the several writs of fi. fa., above mentioned, had issued. This case was argued on a former day in this term by

Manning for the plaintiffs. The question in this case depends upon the 6 *G.* 4. *c.* 16. *s.* 108., by which it was enacted, that " no creditor having security for his debt, or having made any attachment in *London*, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt; except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon, any part of the property of such bankrupt before the bankruptcy: provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable

 with

1828.

NOTLEY against BUCK.

with such creditors." In the case of *Taylor* v. *Taylor* (*a*), this Court refused to set aside an execution issued upon a judgment by nil dicit on a warrant of attorney, and served and levied by seizure before the bankruptcy; but this case is very different, for the execution may be valid; the sheriff may have done right in seizing and selling the goods, and still he may not be justified in paying over the proceeds to the judgment-creditor; and if so, an action for money had and received lies against him at the suit of the assignees. The case of *Wymer* v. *Kemble* (*b*) shews that the present case is within the 108th section; for it was there said, that a person having issued an execution on a judgment, is a creditor, having security for his debt.

Coleridge contrà. The clause in question may be divided into three parts, — the rule, the exception, and the proviso. The party who issued the execution mentioned in this case may be within the rule, as a creditor having security, but he is also within the exception; for the execution was served and levied by seizure before the bankruptcy. And admitting that he is within the proviso also, still an action at law cannot be maintained

creditors. But supposing that to be otherwise, it is very doubtful whether the matter can be investigated in a court of law. *Holroyd* J. expresses such a doubt in *Taylor* v. *Taylor*. Again, the section in question was substituted for the ninth section of the 21 *Jac.* 1. *c.* 19., which clearly had reference only to proceedings before commissioners of bankrupt; and it is probable that the 108th section of the modern act had reference to similar proceedings. The rule, however, would have been too large; it would have affected all judgment-creditors, and, therefore, the exception was introduced in favour of executions; and then the proviso at the end of the clause was added, not merely to apply to that part of the creditors mentioned in the exception, but it includes all creditors that have issued execution upon judgments by nil dicit, which are for the most part given for more than the sum really due. In such case, the act intended that the party should prove the debt really due before the commissioners, and not the whole amount of the judgment.

Manning in reply. If that construction were to prevail, the clause would be rendered nugatory; for the commissioners have no power to compel a party to come before them and prove a debt, or to refund any part of the money obtained by means of an execution, as was lately observed by the Vice-Chancellor in the case of *Gibbins* v. *Phillips* (*a*).

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court. The question in this case arises upon

(*a*) Not yet reported.

1828.

Notley against Buck.

the 108th section of the last bankrupt act, 6 *G.* 4. *c.* 16. The case states, that two creditors obtained judgment against the bankrupt by nil dicit; the one on a bond, the other on a warrant of attorney. The latter cannot have been an adverse suit, and it does not appear that the former was; and both the judgments are, as stated, within the very words of the proviso.

The proviso is introduced into this act, for the first time, as an addition to the 103d section of the former statute, 5 *G.* 4. *c.* 98. The intention certainly was to prevent voluntary preferences; the words may probably go beyond the intention; but if they do, it rests with the legislature to make an alteration; the duty of the Court is only to construe and give effect to the provision. The intention, that a creditor under such circumstances shall not have the full benefit of his execution, but only be paid pari passu with other creditors, is sufficiently manifest. The difficulty is, as to the mode of giving effect to this intention, no mode being mentioned in the act. And, upon consideration, it appears to us that the only effectual mode is to prevent the creditor from receiving the money produced by a sale of the goods taken in execution. If the creditor is allowed to receive and

will obtain the advantage which this proviso is intended to prevent. The safe course, therefore, is to say, that he ought not to receive the money; and if he ought not to receive it, but does receive it, then he will have received money belonging, not to himself, but to the assignees of the bankrupt, and will, consequently, be liable to an action at their suit for money had and received to their use. And taking this to be the law, and the true effect of the statute as to the execution creditor, what will be the duty of the sheriff, having, as in the present case, notice of the bankruptcy, the commission, and the adjudication? No other reasonable answer can be given to this question than to say, that the duty of the sheriff is to pay the money to the assignees, to whom it legally belongs, and not to the creditor, to whom it does not belong. And this being his duty, if he does pay the money to the creditor, he places himself in the ordinary situation of a man who, having in his hands the money of *A.*, thinks fit to hand it over to *B.* The wrongful payment will be no discharge, but he will still be liable to an action at law for money had and received, at the suit of the assignees to whom the money belongs. The seizure, being prior to the act of bankruptcy, will be lawful and right; it is not necessary to say whether the sale be lawful or tortious; the sale may be a lawful act, and yet the proceeds may belong to the assignees; or, if it be wrongful, they may waive the wrong, and sue for the proceeds as money received to their use.

The sheriff may certainly, in some cases, be placed in a situation of difficulty, because the commission may turn out to be invalid; but this difficulty is of the same kind as that in which he is placed in the case of an alleged act of bankruptcy before his seizure, and a

1828.

NOTLEY *against* BECK.

commission afterwards, and he has the same modes of relief.

For these reasons we are of opinion, that the plaintiffs are entitled to recover, and the verdict must stand.

Postea to the plaintiffs.

Saturday, May 17th.

COLVIN and Others *against* NEWBERRY and BENSON.

Where the owner of a ship, by an instrument called a charter-party, appointed *G. B.* to the command, and agreed that (the ship being tight, &c., and manned with thirty-five men) *G. B.* should be at liberty to receive on board a cargo of lawful goods (reserving 100 tons to be laden for account of the owner), and proceed therewith to *Calcutta*, and there re-load the ship with a cargo of *East India* produce, and return therewith to *London*, and upon her arrival there and discharge, the intended voyage and service should end. And the owner further agreed, that the complement of thirty-five men should, if possible, be kept up; that he would supply the ship with stores, and that she might be retained in the said service twelve months, or so much longer as was necessary to complete the voyage. In consideration of which, *G.* agreed

CASE against the defendants, as the owners of the ship *Benson*, for the loss of goods, shipped by the plaintiffs in *India* to be conveyed to *England*. The first count of the declaration alleged, that the defendants, before and on the 11th day of *March* 1817, were owners of the *Benson*, whereof one *George Betham* then was master, and which ship or vessel was then riding at anchor in parts beyond the seas, to wit, in the river

1828.

COLVIN *against* NEWBERRY.

Hooghly, in the *East Indies*, and bound on a voyage from thence to the port of *London*; and that the defendants so being owners of the ship or vessel as aforesaid, the plaintiffs heretofore, to wit, on, &c., in the river *Hooghly* aforesaid, shipped and loaded, and caused to be shipped and loaded, in and on board of the said ship or vessel, whereof the said *George Betham* then was master, and which said ship or vessel was then riding at anchor in the river *Hooghly* aforesaid, divers goods and merchandizes, to wit, 2171 bags of sugar, and 191 chests of indigo of them the plaintiffs, then being in good order and well conditioned, and of a large value, to wit, of the value of 20,000*l.* of lawful money of *Great Britain*, to be taken care of, and safely and securely carried and conveyed in and on board of the said ship or vessel from the river *Hooghly* aforesaid to the port of *London* aforesaid; and there, to wit, at the port of *London* aforesaid, to be safely and securely delivered in the like good order, and well conditioned, to certain persons, commonly called and known by the names, and using the style and firm of Messrs. *Bazett*, *Farquhar*, *Crawford*, and Company, or to their assigns, (the act of *God*, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted,) for certain freight and reward, payable by bills in that behalf: and, although the said goods and merchandizes were then and there had and received by the said *George Betham*, so being master of the said ship or vessel as aforesaid, in and on board of the said ship or vessel in the river *Hooghly* aforesaid, to be carried, conveyed, and delivered as aforesaid; yet the defendants, so being owners of the said ship or vessel as aforesaid, not regarding

1828.

COLVIN against NEWBERRY.

their duty as such owners, but neglecting the same, and contriving, and wrongfully and unjustly intending to injure the plaintiffs in this behalf, did not, nor would, take care of, and safely or securely carry or convey the said goods and merchandizes, or cause the same to be carried and conveyed in or on board of the said ship or vessel, or otherwise, from the river *Hooghly* aforesaid to the port of *London* aforesaid, nor there, to wit, at the port of *London* aforesaid, safely or securely deliver the same, or cause the same to be delivered to Messrs. *Bazett*, *Farquhar*, *Crawford*, and Company, or to their assigns, although the defendants were not prevented from so doing by the act of *God*, the King's enemies, fire, or other dangers or accidents of the seas, rivers, or navigation of any nature or kind soever; but, on the contrary thereof, they, the defendants, so being owners of the said ship or vessel as aforesaid, so improperly behaved and conducted themselves with respect to the said goods and merchandizes, that by and through the mere carelessness, negligence, misconduct, and default of the defendants, and their servants, in this behalf, a great part of the said goods and merchandizes, being of great value, to wit, of the value of 10,000*l.* of the like lawful

1828.

COLVIN *against* NEWBERRY.

term, 1826, a special verdict was found as to the promises in the first count of the declaration mentioned in substance as follows. On the 11th *March*, in the year of our Lord 1817, the plaintiffs shipped on board the ship *Benson*, near *Calcutta*, in the *East Indies*, then riding at anchor in the river *Hooghly*, 2171 bags of sugar, and 191 chests of indigo, then being in good order, and well conditioned, for which the following bill of lading was signed by *George Betham*, then being the master of the said ship, under the circumstances hereinafter mentioned: "Shipped by the grace of *God*, in good order and well conditioned, by Messrs. *Colvins*, *Bazett*, and Company, in and upon the good ship called the *Benson*, whereof is master, under *God*, for this present voyage, *George Betham*, and now riding at anchor in the river *Hooghly*, and by *God*'s grace bound for *London*, to say, 2171 bags of sugar, and 191 chests of indigo, being marked and numbered as in the margin, and are to be delivered in the like good order, and well conditioned, at the aforesaid port of *London*, the act of *God*, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted, unto Messrs. *Bazett*, *Farquhar*, *Crawford*, and Company, or to their assigns; freight for the said goods being paid by bills." *G. Betham* received the said goods on board the said ship in the river *Hooghly*, to be carried and conveyed according to the bill of lading. At the time of the said goods being so shipped and received, and the said bill of lading signed, and before that time, the defendants were the owners of the said ship, and before the said ship sailed to the *East Indies*, and whilst they were such owners, the following charter-party, bearing date

1828.

COLVIN against NEWBERRY.

date the 7th day of *June*, in the year of our Lord 1816, was executed by the defendant *Thomas Starling Benson*, who was then the managing owner of the ship, and acting on behalf of himself and the other owner of the ship on the one part, and *G. Betham*, of the other part, for the said ship *Benson*.

"This charter-party of affreightment, made and concluded in *London* the 7th day of *June*, in the year of our Lord 1816, between *Thomas Sterling Benson*, of the city of *London*, part owner of the good ship or vessel called the *Benson*, of 573 tons measurement, or thereabouts, now lying in the port of *London*, of the one part; and *George Betham* of the city of *London*, merchant and mariner, freighter of the said ship, of the other part; witnesseth, that the said owner, for the considerations hereinafter mentioned, doth hereby promise and agree to and with *George Betham*, his executors, administrators, and assigns, that he *G. Betham* shall have, and he is hereby accordingly appointed to, the command of the said ship, but with such restrictions as hereinafter mentioned, and subject to the proviso or condition hereinafter contained respecting the appointment of an agent on board the said ship on the part of the said owners. And the said ship being

1828.

COLVIN *against* NEWBERRY.

ship can reasonably stow and carry over and above her stores, tackle, apparel, and provisions, and reserving sufficient room in the said ship for 100 tons of goods to be laden by or for account of the said owner as hereinafter is mentioned. And the said ship being so laden, he *G. Betham* shall and will set sail therewith and proceed to *Calcutta* in the *East Indies*, with liberty to touch at *Madeira* and *Madras* in her outward passage; and being arrived at *Calcutta* aforesaid, shall and will unload the said outward cargo, and reload the said ship with a cargo of *East India* produce, and return with the same to the port of *London*, and upon her arrival there, and being finally discharged of her cargo, and cleared by the revenue officers, the said intended voyage and service is to end and be completed, the act of God, the King's enemies, restraint of princes and rulers, fire, and all and every the dangers and accidents of the seas, rivers, and navigation of what nature or kind soever excepted. And the said owner doth hereby further promise and agree to and with *G. Betham*, his executors, &c. that in case any of the aforesaid complement of thirty-five men and boys shall happen to die, or desert, or leave the said ship during the said intended voyage and service, so that the number shall be reduced below thirty-two, that then and in every such event happening, the aforesaid number of thirty-two shall, if practicable, be kept and made up at the expence of the said owner. And further, that the said ship shall at all times during her said intended voyage and service be furnished and provided with proper and sufficient stores, provisions, and other necessary articles, and that the said ship shall, if required, be kept and continued in the service aforesaid for and during the term of twelve calendar

1828.

COLVIN against NEWBERRY.

calendar months, to be accounted from the twelfth day of the present month of *June*, and for and during such longer time or term as may be necessary to complete her aforesaid voyage, and until her return to the port of *London*, being finally discharged of her homeward cargo, and cleared by the revenue officers. And the said owner doth also promise and agree, that the said ship shall, previous to her departure from the port of *London* on her above-mentioned voyage, be furnished and provided with good water casks, capable of containing eighteen tons of water, and the said owner doth also engage to provide the said ship with coals and wood for cooking and dressing the passengers' provisions, for which the said freighter is to pay or allow unto the said owner, at and after the rate of fourteen pence for every passenger or servant per lunar month, and so in proportion for a less period. In consideration whereof, and of every thing above mentioned, he, *G. Betham*, doth hereby promise and agree to and with the said *Thomas Starling Benson*, in manner and form following, that is to say, that he, *G. Betham*, shall and will take upon himself the command of the said ship for and during her said intended voyage, and until her return to the port of *London*, and shall

1828.

COLVIN *against* NEWBERRY.

well and truly pay or cause to be paid unto the said owner freight for the use or hire of the said ship, at and after the rate of 25*s.* per ton, register measurement of the said ship per calendar month, for and during the aforesaid term of twelve calendar months certain, and for and during such longer time or term, if any, as may be necessary to complete her said intended voyage, and until her return to the port of *London*, and being finally discharged of her homeward cargo, and cleared by the revenue officers, or up to the day of her being lost, captured, or last seen or heard of; such freight to be paid in manner following: that is to say, the sum of 1000*l.*, part thereof, at or before the execution of these presents; the sum of 2000*l.*, further part thereof, by approved bill or bills to be drawn in *London* upon *Calcutta*, in favour of the said owner, payable, as to one moiety thereof, at one calendar month, and as to the other moiety thereof at two calendar months next after the ship shall arrive at *Calcutta*, and the residue and remainder of such freight to be paid or secured to the satisfaction of the said owner, upon the arrival of the ship in the port of *London*, and previous to commencing the discharge of her homeward cargo: Provided always, that in case the said ship shall be kept or detained at *Calcutta* aforesaid more than ninety days, then and in such case the said *George Betham* doth hereby engage to pay or cause to be paid at *Calcutta* aforesaid, to the agent of the said owner, the sum of 1000*l.*, either in cash or by bills to be approved of by such agent, in part payment of the balance of freight which may become due under and by virtue of this charter-party; and the further sum of 1000*l.* at the expiration of every sixty days after the said ninety days

which

1828.

COLVIN against NEWBERRY.

which the said ship may expend or lie at *Calcutta* aforesaid. And it is hereby declared and agreed by and between the said parties, that bills remitted from *India* in manner hereinafter expressed shall be deemed, taken, and considered as good and sufficient security for the payment of the residue or balance of freight which may become due under and by virtue of these presents as hereinbefore mentioned. And *G. Betham* doth hereby especially promise and agree, that all and every the bills of exchange which may be taken in payment of the freight of the said ship's homeward cargo, shall be made payable to, or to the order of, Messrs. *Buckles*, *Bagster*, and *Buchanan*, of the city of *London*, merchants, or indorsed over to them, and delivered to the owner's agent, to be by him remitted to the said *Buckles*, *Bagster*, and *Buchanan*, in *London*, who it is hereby especially agreed by and between the said parties, are to receive the amount thereof, as joint trustees for the said owner and *G. Betham*, he *G. Betham* hereby authorizing and empowering them to appropriate the proceeds of such bills of exchange in or towards payment to the owner of the balance of freight which may be or become due to him under and by virtue of these presents, and the residue, if any, to *G. Betham*. And *G. Betham* doth

1828.

COLVIN against NEWMARAY.

the ship. And further, that all expences of bulk heads, cabins, and other accommodation for passengers, shall be paid by him *G. Betham*; the materials for which are to be left on board the ship at the termination of the voyage, and become the property of the owner. And *G. Betham* doth also agree to pay and defray all port charges and pilotage which may be incurred by the ship during her intended service, save and except such as may be incurred in the port of *London*, outward and homeward bound, and once at *Calcutta*. And *G. Betham* doth hereby further agree, that the owner shall have the liberty of shipping on board the said ship outward bound, freight free, any quantity of iron, vinegar, and mustard he may think fit, not exceeding in the whole 100 tons, to be delivered at *Calcutta*: Provided always, and it is hereby expressly agreed and understood by and between the parties to these presents, and particularly by *G. Betham*, that an agent shall be put on board the ship by the owner for and during the whole of her aforesaid voyage and service, and who is to have a separate cabin in the said ship for his sole use, and to mess at the said *George Betham*'s table; which agent is to have the sole management, direction, and superintendance of the ship's stores and provisions, and the issuing and delivering out of the same for and during the intended voyage; and such agent is likewise to have the sole ordering and purchasing of any supplies, stores, provisions, and other articles which may be required for the use of the ship during her voyage, and that all bills which may be required to be drawn upon the owners of the ship for any such supplies or otherwise on account of the ship, shall be drawn by such agent only: Provided also, and it is hereby further agreed by and between

1828.

COLVIN against NEWBERRY.

between the said parties, and especially by the owner, that the freighter shall have the liberty and privilege of employing the ship in the *East Indies* for any intermediate voyage or voyages he may think fit, without prejudice to this charter-party, but not exceeding in the whole the time or term of twelve calendar months, to be computed from and after the expiration of thirty days next after the arrival of the ship at *Calcutta* aforesaid, upon his *G. Betham*'s paying or causing to be paid to the owner the same rate of freight as is hereinbefore stipulated, viz. 25*s.* per ton per month for all such additional time as the ship may be so employed or detained in *India*; such additional freight being paid to the owner's agent for the time being, or secured to his satisfaction, previous to the ship entering or proceeding on such additional voyage or service. And it is hereby expressly provided and declared, that in case *G. Betham* shall proceed with the said ship to any part or place other than *Madeira*, *Madras*, and *Calcutta* aforesaid, without the special leave in writing of the agent of the owner for the time being, or if *G. Betham* shall be guilty of a breach of any or either of the promises and agreements herein contained on his part, then and in any such case he shall be and become divested of any

1828.

COLVIN *against* NEWBERRY.

commander of the ship *Benson*, on a voyage to *India*. Wages, say 10*l.* per month. No primage or privilege of tonnage whatever. Cabin allowance for voyage (it being understood that the agent, chief and second mates, and surgeon, if any, mess in cabin), 150*l.*, owner providing nothing. Allowance while in *India*, three sicca rupees per day." *Samuel Oviatt* went as agent on board the said ship *Benson* under the said charter-party, on the said voyage, and carried out letters of introduction from the persons using the said firm of *Buckles*, *Bagster*, and *Buchanan*, being merchants in *London*, on behalf of the said defendants, to the plaintiffs, by which he was directed to apply to them in case of necessity, and he did apply to them, and they acted as agents at *Calcutta*, both for the said defendants and *G. Betham* as hereinafter mentioned. *Samuel Oviatt* acted under a power of attorney executed by the defendant *Thomas Starling Benson*, which recited the charter-party, and then gave *Oviatt* authority to do on his behalf all things for which that instrument contemplated the appointment of an agent. *Samuel Oviatt* carried out with him the charter-party, and communicated it to the plaintiffs as soon as he arrived at *Calcutta*, and before the shipping of the goods, and the plaintiffs before that time read the charter-party, and received a copy thereof, and for the freight of the said quantity of sugar and indigo in the bill of lading mentioned, the plaintiffs drew bills upon certain other persons, payable sixty days after the ship *Benson's* arrival in *London* to the order of *Buckles*, *Bagster*, and *Buchanan*, which bills they delivered to *S. Oviatt* to be remitted to the said last mentioned persons, pursuant to the stipulation in the charter-party; and the said bills were so remitted. *G. Betham* employed the plaintiffs as

1828.

Colvin against Newberry.

his agents at *Calcutta*, who accordingly acted as his agents, and collected and paid over to him the freight of the goods carried in the ship on the voyage from *London* to *Calcutta*, and procured freight for him on the voyage from *Calcutta* to *London*; and they had a commission from him for procuring such freight. The ship sailed on her voyage from the river *Hooghly* to *London* with the said quantities of sugar and indigo on board, but they never were delivered to the plaintiffs or their assigns pursuant to the bill of lading, although no act of God, the king's enemies, fire, or any other dangers or accident of the seas, rivers, or navigation of what nature or kind soever, prevented the same from being so delivered; but, on the contrary thereof, 1651 bags of the said sugar, and twelve chests of the said indigo were wholly lost to the plaintiffs, and the residue of the said sugar and indigo greatly lessened in value. This case was argued on a former day in this term by

Parke for the plaintiffs. The effect of this instrument, called a charter-party, was not to demise the ship to *Betham*, so as to enable him to put her up as a

hereby accordingly *appointed to the command* of the said ship; but with such restrictions as hereinafter mentioned." Now that explains the whole of what follows. Again, the defendants stipulated to have an agent on board, who had power to remove *Betham* from the command for breach of any of the covenants in the contract made between him and the owners. *Betham* then was master, and instead of contracting for any fixed wages, he guaranteed to his owners certain profits, and was to retain all the surplus, and third persons were entitled to consider him merely as master, although they knew of the charter-party. Besides, the owners expressly stipulate for a lien upon all freight bills; and it would be singular if they could insure to themselves all the benefit derived from carrying goods, and avoid the risk. *Boucher* v. *Lawson* (*a*) is the leading case on this subject. Lord *Hardwicke* there said that owners are liable for the loss of goods on two grounds. First, that they appoint the master; and, secondly, that they receive the freight. In that case the second reason did not apply, and ultimately judgment was given for the defendant; but it is an express authority that if a person be appointed and act as master, the owner is responsible for goods shipped on board the vessel, although there may be some special agreement between him and the master as to the mode in which the wages of the latter are to be paid and the freight received. The authority of the case of *Parish* v. *Crawford* (*b*) may perhaps be doubtful; but that was a much stronger case than this in favour of the defendant. *James* v. *Jones* (*c*), and *M'Kenzie* v. *Rowe* (*d*), which will probably be cited on

(*a*) *Cas. temp. Hardw.* 85. 194.
(*b*) *Abb. on Shipping*, 19.
(*c*) *Abb. on Shipping*, 20.
(*d*) 2 *Campb.* 482.

 the

1828.

COLVIN against NEWBERRY.

the other side, are distinguishable; in the former the owner had nothing to do with the freight, in the latter there was no evidence that the goods were received on board the vessel by any person appointed by the defendants.

Campbell contrà. This action, although in form an action on the case, is in reality an action of contract. The cause of action, as stated, does not arise upon the breach of any common law obligation, but upon a breach of duty arising out of a contract, which is the foundation of this action, as well as of an action of assumpsit. The duty of the defendants was to deliver the goods, as alleged in the declaration, if they contracted to do so for a sufficient consideration. It was, therefore, essentially necessary for the plaintiffs to prove the contract as laid. So much is this an action of contract that, according to *Powell* v. *Layton* (*a*), non-joinder of a party as defendant might have been pleaded in abatement; and *Bretherton and Others* v. *Wood* (*b*) (in error) was distinguished from the former case, because the defendants below were charged as common carriers. How then is the contract laid in this case? The declar-

1828.

COLVIN against NEWBERRY.

there any thing in the transaction that could authorize the plaintiffs to consider the defendants as the receivers of the freight, and carriers of the goods. It is found that the plaintiffs knew all the circumstances, that they read the charter-party, and were furnished with a copy, and that the charter-party was made bonâ fide between the parties. That instrument has a double purpose; it first appoints *Betham*, master, and then charters the ship to him. There is nothing improper in that; an owner may be master, why then should not an owner pro hâc vice? If that be so, this is like all ordinary charter-parties. It is true that it does not contain express words of demise, but the Court must look at the whole of the instrument, and if it authorizes *Betham* to put up the ship as a general ship, it is a charter-party. In *Saville* v. *Campion* (*a*), and *Tate* v. *Meek* (*b*), there were no express words of demise, and it was held that the owner had a lien for his freight, but it was never doubted that the hirer might make what use of the vessel he pleased, for the period of time mentioned in the charter-party. Suppose the same stipulations as to freighting this vessel had been entered into by the owner with a third person, instead of the master, and that by the same instrument *Betham* had been appointed master, there could be no doubt that such third person must have been considered the freighter, and that shippers, with notice, could not have made the owners responsible for their goods. Then the circumstance of an agent for the owners being on board can make no difference, for his duty was merely to look after the stores, and to take care that the covenants in the charter-party were per-

(*a*) 2 *B. & A.* 503. (*b*) 8 *Taunt.* 280.

1828.

Colvin against Newbery.

formed. He had no authority whatever to interfere with the use of the ship. He was like the agent of a mine owner appointed to see covenants for working the mine duly performed by the lessee. There was no privity in this case between the owner and the shipper. If there had been a contract, it must have been reciprocal, but that was clearly not so. The owner could not have sued the shipper for freight, and, therefore, is not, on the ground of contract, responsible for the goods. The broad question, therefore, arises, Whether an owner is liable in an action founded on an implied contract where the ship has been chartered to a third person. *Boucher* v. *Lawson* is not in point, the ship was not chartered to the master, and eventually judgment was given for the defendant. *Parish* v. *Crawford* was only a nisi prius case, and is more than answered by the more recent decisions of *James* v. *Jones*, and *M'Kenzie* v. *Rowe*. In the latter case, it is true, the report states, that there was no evidence that the goods were received on board by any person appointed by the defendants, the owners, but that can make no difference, where the shipper knows of the contract made between the owner and master. In *Abbott on Shipping*, p. 22., a doubt is ex-

1828.

COLVIN against NEWBERRY.

East Indies, against the owners of the ship for the loss of the goods. The goods were shipped by the plaintiffs, and the bills of lading were signed by *G. Betham*, who was the master of the ship. These facts, amongst various others, have been found by a special verdict. The defendants rested their defence on the ground that an instrument, called a charter-party, had been made by one of them, on the part of himself and the other owners, before the ship sailed from *London* on the voyage to the *East Indies*; and it was contended, that they, having chartered the ship, were no longer liable, as owners, for the loss of goods shipped to be conveyed on the voyage for which the ship was chartered. (His Lordship then stated the particulars of the charter-party, and the other material parts of the special verdict.) Now, the question is, Whether the owners of the ship were, by this instrument, made between them and the master, to be considered as having chartered their ship in such a manner as to be released from the responsibility, which belonged to them by the general rules of law as owners, for goods shipped on board their ship? And, on consideration of the case, we are of opinion, that they are not discharged by that instrument; for, taking the whole together, it appears to be, in substance, nothing more than the appointment of a master, upon an undertaking by him that the ship shall earn a certain sum, and all beyond that sum was to be for his own benefit, but all loss was to be made good by him; and it is provided, that he shall secure the performance of that undertaking, by remitting to the agents of the owners all freight-bills drawn in respect of goods shipped at *Calcutta*. It certainly would create a great deal of confusion, and do a great deal of mischief, as far as regards the shippers of

1828.

COLVIN against NEWBERRY.

goods, if it were competent for the owners of the ship to discharge themselves from responsibility by means of such a contract as was executed in this instance. It was relied on, during the argument, that the plaintiffs were informed of the nature of that contract; but if the effect of it be not such as the defendants contend for, the responsibility, by the general rules of law, belongs to them as owners with respect to goods shipped on board their ship. We being, therefore, of opinion, that the plaintiffs are not prevented, by a knowledge of that instrument, from suing the defendants, as owners, the judgment of the Court must be for the plaintiffs.

Judgment for the plaintiffs.

1828.

BELCHER *against* W. B. SIKES and Others, Executors of the last Will and Testament of A. BRYMER, deceased, who was surviving Executor of the last Will and Testament of JAMES BRYMER, deceased.

DECLARATION stated that heretofore, and in the lifetime of *James Brymer*, to wit, on the 10th of *March* 1814, at, &c., by a certain indenture made between

An indenture recited, that *A.* and *B.*, in *May* 1813, had entered into a contract with the commissioners for victualling the navy, to supply his Majesty's ships with sea provisions and victualling stores, and that the said *A.* and *B.*, in *September* 1813, had mutually agreed to dissolve the copartnership entered into by them as aforesaid, for carrying on the business of the said contract, and all other contracts, entered into with the commissioners by *B.* or *A.*, and in which they, *or either of them*, were in anywise interested or concerned, and all other copartnerships whatsoever subsisting between them; and upon the treaty for such dissolution, it was agreed that the share of *B.* in the property belonging to the copartnership should be estimated at 50,000*l.*, and be taken by *A.* at that sum. It then further recited, that it had been agreed that *A.* should, by his bond, indemnify *B.* against all damages by reason of his having entered into the said recited contract with *A.*, and by reason of all other contracts entered into by *B.* and *A.* respectively, and in which they *or either of them* had any interest as aforesaid. The indenture then witnessed that *A.* and *B.*, by mutual consent, dissolved the said copartnership so entered into, and then or lately subsisting between them for supplying his Majesty's ships with provisions and stores, under or by virtue of the said recited contract, and of all other contracts in which *B.* and *A.*, *or either of them*, had any interest or concern as aforesaid. The deed then contained a mutual release of all actions, accounts, reckonings, &c. which either of them (*A.* and *B.*) now had or ever had, or which either of them, or either of their executors, should or might thereafter have, claim, or demand against, from, or under the other of them, or his heirs, executors, &c., for or by reason of the said copartnership or copartnerships so thereby dissolved as aforesaid, upon or by reason of any of the acts, matters, and things whatever in anywise relating to the said recited contract, and all other contracts in which *B.* and *A.*, *or either of them*, had any interest whatsoever. *B.* then assigned to *A.* all the share and interest of him (*B.*) of and in all the debts and sums of money whatsoever, then due and owing to them (*A.* and *B.*) under or by virtue of the same several contracts, or otherwise, and all bonds, bills, &c. relating to the said contract, debts, and sums of money, or any part thereof, and all the goods, stock, and effects whatsoever then belonging to them, the said *A.* and *B.*, as such copartners respectively, and all the right, title, and interest of him (*B.*) of, in, to, from, out, or in respect of the *premises*. A power was then given to *A.* to recover, and give discharges for the said debts.

At the time when this deed was executed, *B.* and *A.* had been concerned in conducting business together as contractors for the navy. In some contracts *B.* was solely interested as contractor; in others *A.* was solely interested as contractor; and in some they were jointly interested as partners and contractors. They had, however, both been concerned in all the contracts. *A.* having been agent in managing those contracts in which *B.* was solely interested, and *B.* having been agent in managing those contracts in which *A.* was solely interested; and there was money due from the commissioners of the navy in respect of each of

1828.

BELCHER *against* SIKES.

of these classes of contracts: Held, that by this deed, the contracts in which *B.* had been originally separately interested, were constituted as between *A.* and *B.* partnership contracts, and consequently, that *A.* was entitled by the deed to receive all sums due to *B.*, in respect of those contracts, at the time of the execution of the deed.

By the deed, *B.* for himself, his heirs, executors, and administrators, covenanted that, for and notwithstanding any act done by him (*B.*) or should

between the plaintiff, of the one part, and *James Brymer* of the other part, after reciting, amongst other things, that the plaintiff and *James Brymer* in or about the month of *May* 1813, entered into and signed a contract with three of the commissioners for victualling his Majesty's navy, to supply and deliver on board his Majesty's ships at *Halifax* in *Nova Scotia*, *Quebec* in *Canada*, *Norfolk* in *Virginia*, and the island of *Bermuda*, all such quantities of sea provisions and victualling stores, consisting of the several articles specified in the contract, as should from time to time be required for the use of the ships, &c. for the space of twelve calendar months certain, and further until six months' notice in writing should be given by either of the contracting parties for the termination of the contract, and for which provisions and victualling stores so to be supplied and delivered, it was agreed that the plaintiff and *J. Brymer* should be paid at the rates and prices mentioned in the contract, upon production of the vouchers and documents therein also mentioned; and further reciting that the plaintiff and *J. Brymer*, in pursuance of the contract, supplied and delivered from time to time divers considerable quantities of sea pro-

J. Brymer or the plaintiff, and in which they *or either of them* were in any ways interested or concerned, and all other copartnerships whatsoever subsisting between them; and upon the treaty for such dissolution it was agreed that the share and interest of *J. Brymer* of and in the monies, property, and effects belonging to the said copartnership, or to them the said parties on account thereof, should be estimated at the sum of 50,000*l.*, and be taken by the plaintiff at that sum; and that the plaintiff should thenceforth have the full benefit of the said recited contract, and carry on the business thereof on his own account, and for his own exclusive use; and that he should concur with *J. Brymer* in an application to the commissioners for victualling his Majesty's navy to withdraw the name of *J. Brymer* from the said recited contract; and also reciting that the application had accordingly been made to the commissioners, who consented that the name of *J. Brymer* should be withdrawn, and the same had accordingly been withdrawn from the said recited contract; and also reciting that the plaintiff had paid to *J. Brymer* 30,000*l.* in part of the said sum of 50,000*l.*, the value of his share of the *partnership* property, monies, and effects as he *J. Brymer* did thereby admit and acknowledge, testified by his executing the said recited indenture. And the plaintiff for securing to *J. Brymer* the payment of the sum of 20,000*l.*, residue of the said sum of 50,000*l.*, and interest from the 1st of *January* then last past, had accepted certain bills of exchange therein particularly mentioned. And also reciting that upon the treaty for such dissolution as aforesaid, it was further agreed that the plaintiff should, by his bond in a sufficient penalty, save, defend, and keep harmless and indemnified *J. Brymer* of, from, and

against

1828.

BRUCKER against SEYER.

against all costs, losses, charges, damages, and expences whatsoever by reason or on account of his having entered into the recited contract with the plaintiff, and by reason or on account of all other contracts entered into by *J. Brymer* and the plaintiff respectively, and in which they *or either of them* had any interest or concern as aforesaid; and, accordingly, the plaintiff had by his bond under his hand and seal, bearing even date with the recited indenture, become bound to *J. Brymer* in the penal sum of 10,000*l.*, which bond, after reciting as in the indenture mentioned, was conditioned to be void, if the plaintiff, his heirs, executors, or administrators did and should, from time to time thereafter, at his and their own costs and charges, well and effectually save, defend, keep harmless and indemnified, *J. Brymer*, his heirs, executors, administrators, and assigns, and every of them, and his, and their lands and tenements, goods, and chattels, of, from, and against *all claims and demands whatsoever*, already made or thereafter to be made *by government*, upon or against *J. Brymer*, for or in respect of the said recited contract, or of any other contract or contracts, entered into by *J. Brymer* and the plaintiff respectively with the commissioners, and in which *J. Brymer*

[redacted]

commenced, sued, or prosecuted against, paid, borne, or sustained by, or be made upon, *J. Brymer*, his heirs, executors, or administrators, for, or by reason, or means, or on account of the same debts and sums of money, contracts, and engagements, or any, or either of them, or for, or by reason, or means, or on account of any breach or non-performance, either made or committed, or to be made or committed, of the said several contracts so entered into as aforesaid, or any, or either of them, or any part thereof, or any article, act, matter, or thing whatsoever, in anywise relating thereto. It was witnessed by the indenture that, in further pursuance of the said recited agreement, and in consideration of all and singular the premises, they, the plaintiff and *J. Brymer*, did, by mutual consent, dissolve and determine the co-partnership so entered into, and then, or lately, subsisting between them, for supplying his majesty's ships, &c., at, &c., with sea provisions and victualling stores as aforesaid, under or by virtue of the recited contract, and of all other contracts in which *J. Brymer* and the plaintiff, *or either of them*, had any interest or concern as thereinbefore mentioned, and all other co-partnerships subsisting between them, the plaintiff and *J. Brymer*, in any manner, or upon any account whatsoever, and did thereby declare and agree that the same co-partnership should be, and be considered, as having ceased, determined, and been utterly void to all intents and purposes whatsoever, upon the said 17th day of *September* 1813; and that notice of such dissolution of the said co-partnership should be forthwith signed by the said parties, and inserted in the *London Gazette*. And each of them, the plaintiff and *J. Brymer*, did thereby, for himself, his heirs, executors, and administrators, release, acquit,

1828.

BELCHER *against* SIKES.

acquit, and for ever discharge the other of them, and his heirs, executors, and administrators, of, and from all actions, suits, causes of action and suits, debts, *accounts*, *reckonings*, controversies, sum and sums of money, damages, costs, losses, charges, claims, and demands whatsoever, at law or in equity, or otherwise, which, either of them, the said plaintiff and *J. Brymer*, then had, or ever had, or which either of them, or either of their executors or administrators, could, should, or might thereafter have, claim, or demand against, from, or upon, the other of them, or his heirs, executors, or administrators, for or by reason, or means, or on account or in consequence of the said co-partnership or co-partnerships between them, so thereby dissolved as aforesaid, upon, or by reason, or means, or on account, or in consequence of all or any of the acts, transactions, matters, and things whatsoever, in any wise relating to, touching, or concerning the said recited contracts, and all other contracts in which *J. Brymer* and the plaintiff, *or either of them*, had any interest whatsoever, or the business or concern thereof, or the said copartnerships, or any or either of them, or on any other account whatsoever (save only and except the said bills of exchange so accepted by the plaintiff as aforesaid, for the purpose of securing the said sum of 20,000*l.* and interest at the times and in manner aforesaid, and all and every remedies, &c. to be pursued by *J. Brymer*, his executors, administrators, or assigns for recovering the payment of the same or any or either of them, and also except the said bond, and all means to be taken or pursued by *J. Brymer*, his executors, or administrators, for enforcing the due execution and performance of the condition thereof, or for recovering damages on account of the breach or non-performance of

1828.

BELCHER against SIKES.

of the same or any part thereof. And it was by the indenture also witnessed, that in further pursuance of the recited agreement on the part of *J. Brymer*, and in consideration of all and singular the premises, he *J. Brymer* did bargain, sell, assign, transfer, set over, and confirm unto the plaintiff, his executors, &c. all the share and interest of him *J. Brymer* of, in, and to all and singular the debts, sum, and sums of money whatsoever then due and owing to them the plaintiff and *J. Brymer* by virtue or in consequence of the same several contracts or otherwise, and all bonds, bills, and notes relating to the said contract debts and sums of money, or any of them, or any part thereof, and of and in all and singular other the monies, goods, chattels, stock, and effects whatsoever and wheresoever then of or belonging to them the plaintiff and *J. Brymer* as such copartners respectively; and all the right, title, and interest, property, claim, and demand whatsoever of him *J. Brymer* of, in, to, from, or out of or in respect of the premises. To have, hold, receive, take, and enjoy the said share and interest of him *J. Brymer*, assigned or intended to be assigned by the said indenture of and in the said debts, monies, goods, chattels, and all and singular other the effects and premises thereinbefore mentioned, and every part of the same, and all benefit and advantage thereof unto the plaintiff, his executors, administrators, and assigns, as and for his and their own proper monies and effects absolutely and with full power and authority to and for him and them to recover, receive, and give effectual acquittances and discharges for the same sum and sums of money, debts, and premises, and every part thereof, but subject nevertheless as therein mentioned. And *J. Brymer* did thereby for himself, his heirs, executors, and administrators

1828.

BELCOMB against SIZER.

ministrators (amongst other things) covenant and agree with the plaintiff, his executors, administrators, and assigns that *for and notwithstanding any act, deed, matter, or thing whatsoever made, done, committed, or suffered to the contrary by him J. Brymer*, it should and might be lawful for the plaintiff, his executors, &c. to have, hold, receive, take, and enjoy the said sum and sums of money, debts and premises thereby assigned, or intended so to be, and every part and parcel of the same, *without any let, suit, interruption, or denial of him J. Brymer, his executors or administrators*, or any person or persons rightfully claiming by, through, or in trust for him or them. And, also, that he, *J. Brymer*, should not, nor would at any time thereafter, without the consent in writing of the plaintiff, his executors or administrators, or the order, judgment, or decree of some court of law or equity for that purpose first had and obtained, receive, release, acquit, or discharge all or any part of the same sum and sums of money, debts, and premises; or without such consent, order, judgment, or decree, revoke or countermand all or any of the powers and authorities thereinbefore contained and given to the plaintiff, his executors, administrators, or assigns; as by

[redacted]

Brymer, to wit, on the 18th of *July* 1817, at, &c., the said *A. Brymer*, as executor of the said *J. Brymer*, demanded and received of and from the commissioners, the sum of 20,000*l.*, for and in respect, and on account of the contracts mentioned in the indenture, or some or one of them, and which said last-mentioned sum of 20,000*l.* was part and parcel of the money, debts, and premises assigned by the indenture, and mentioned in the covenant so made by *J. Brymer*, for himself and his executors in that behalf as aforesaid, and thereby, by the act of him *A. Brymer*, being such executor, interrupted and altogether prevented the plaintiff from having, holding, taking, and enjoying the said last-mentioned sum, contrary to the tenor and effect of the indenture, and of the said covenant. Second breach, that, after the making of the said indenture, the said *A. Brymer*, as executor as aforesaid of the said *J. Brymer*, did, without the consent in writing of the plaintiff, or the order, judgment, or decree of any court of law or equity for that purpose first had and obtained, receive, release, acquit, and discharge another large sum of money, to wit, the sum of 20,000*l.*, part of the said sums of money, debts, and premises in the said covenant in that behalf mentioned, contrary to the form and effect of the indenture, and of the covenant so made in that behalf by *J. Brymer* for himself and his executors as aforesaid. Third breach, that *A. Brymer*, as executor of *J. Brymer*, did, without the consent in writing of the plaintiff, or the judgment, &c., of any court of law or equity, revoke and countermand the powers and authorities contained in the indenture. First plea, non est factum; second, that *A. Brymer*

 did

1828.

Bancroft against Sayers.

did not at any time demand or receive any sum or sums of money, part or parcel of the money, debts, and premises assigned by the indenture and mentioned in the covenant so made by *J. Brymer*, from the commissioners for or in respect or on account of the contracts mentioned in the indenture, or any of them, in manner and form, &c. Third and fourth pleas negativing in like manner the allegations contained in the second and third breaches.

The cause came on for trial before Lord *Tenterden* C. J. at the *London* sittings after *Trinity* term 1827, when a verdict was found for the plaintiff, subject to the award of an arbitrator, to whom it was referred to decide upon all matters in difference in that cause; and also to ascertain what sum was received by the late Messrs. *Brymer* on contracts in which the plaintiff and the late *J. Brymer* were jointly interested, and what sum, if any, was received on contracts in which they had no joint interest; and the arbitrator was to state the deed for the opinion of the Court whether the plaintiff was entitled to both, either, and which of the sums. The arbitrator awarded as follows: That the verdict should be entered for the plaintiff upon all the issues, and assessed the

[redacted]

1828.

BELCHER against SUTTS.

had been concerned in conducting business together as contractors for the navy. In some contracts *J. Brymer* was solely interested as contractor; in others, *A. Belcher* was solely interested as contractor; and in some they were jointly interested as partners and contractors. They had, however, both been concerned in conducting all the contracts; *A. Belcher* having been agent in managing those contracts in which *J. Brymer* was solely interested, and *J. Brymer* having been agent in managing those contracts in which *A. Belcher* was solely interested. Under these circumstances, on the 10th day of *March* 1814, *A. Belcher* and *J. Brymer* dissolved partnership by the following deed. (The arbitrator, after setting out the indenture stated in the declaration, proceeded as follows:) At the time when this deed was so executed, there were the following sums due from the commissioners of the Navy Board, viz. under a contract dated the 17th of *September* 1793, the sum of 230*l.* 9*s.* 4*d.*; under seven different contracts, two dated the 24th day of *January* 1798, one dated the 3d of *September* 1798, two dated the 26th of *July* 1803, and two dated the 4th of *August* 1803, the sum of 7177*l.* 14*s.* 9¼*d.*; and, lastly, under a contract dated *July* 6th 1807, the sum of 1185*l.* 18*s.* 0¾*d.* These several contracts were duly entered into with the Navy Board at the above dates. For all these several sums which arose from the final settlement of long and complicated accounts under the above contracts, *J. Brymer* before his death made a claim on the Navy Board. This claim, subsequently to the death of *J. Brymer*, was renewed by his executor *A. Brymer*, and the several sums above mentioned were, after a long investigation, finally allowed, and the monies paid to *A. Brymer* by the Navy Board in

1828.

BELCHER against SIKES.

1817. Of all these transactions *A. Belcher* was ignorant till long after the receipt of the money by *A. Brymer*. As to the contract of the 17th day of *September* 1793, the arbitrator found as a fact that prior to the arrangement made by the above deed of the 10th of *March* 1814, *A. Belcher* was solely interested therein as contractor to the Navy Board. As to the contract of the 6th of *July* 1807, he found as a fact that *A. Belcher* and *J. Brymer* were jointly interested therein as contractors with the Navy Board prior to and at the time of the execution of the deed of the 10th of *March* 1814. And as to the contracts of the 24th of *January* 1798, the 3d of *September* 1798, the 26th day of *July* 1803, and the 4th of *August* 1803, he found that prior to the arrangement made by the deed dated the 10th of *March* 1814, *J. Brymer* was solely interested therein as contractor with the Navy Board. He then stated, that it was contended before him, that under the true construction of the above deed all these several contracts were constituted by the parties as between themselves, partnership contracts, and were included in the provisions of the deed; and that if the Court should think that the deed extended only to contracts with the Navy Board, in which *A. Belcher* and *J. Brymer* were jointly interested prior to the time of its execution, then he assessed the damages for the above breaches of covenant at the sum of 1185*l.* 18*s.* 0¾*d.* instead of the sum of 8594*l.* 2*s.* 2*d.* above awarded.

A rule nisi having been obtained for setting aside the award, or arresting the judgment,

The *Solicitor-General*, *Scarlett*, and *Chilton* shewed cause. The question is, whether by the deed of dissolution

solution all the interest of *James Brymer* in the separate as well as the joint contracts passed to the plaintiff. The intention of the parties must be collected from the whole context and contents of the deed, *Earl of Clanrickard's* case (*a*). The recitals shew clearly that the deed is not confined to those contracts in which both *Brymer* and *Belcher* were parties, but that it also extends to those in which *Brymer* was separately interested. The deed recites the contract made in 1813, and that the parties had agreed to dissolve the partnership entered into between them for carrying on the said contract, and all *other* contracts entered into by the said *A. Belcher* or *James Brymer*, and in which they *or either of them* were interested or concerned. From this recital, therefore, it is clear that other contracts besides those in which the parties were jointly interested were in contemplation. *Belcher* then agrees to indemnify *Brymer* against all claims to be made on him upon or in respect of the separate as well as the joint contracts. Why should *Belcher* indemnify *Brymer* against claims on the separate contracts, unless *Brymer's* interest in the separate contracts was intended to pass to *Belcher?* The covenant for the benefit of the assignee must be considered as co-extensive with the covenant to indemnify the assignor. The language of the assigning part of the deed is not so large as that of the recitals; but even that part of the deed, after making specific mention of partnership contracts, conveys "all the right, title, and interest, &c. of him the said *James Brymer* of, in, to, from, out, or in respect of *the premises*." The word *premises* connects the assigning part of the deed with the recitals, and, so connected, it

(*a*) *Hob.* 275.

1828.

BELCHER against BURNS.

embraces all *Brymer's* interest in his separate as well as his joint contracts. Besides, effect must be given to all the words of the deed. Mention is frequently made of all contracts in which *Belcher* and *Brymer, or either of them*, were interested. It is impossible to give effect to those words without holding that the interest of *James Brymer* in the separate contracts passed to *Belcher* by the deed. Then, as to the objection in arrest of judgment, the covenant is, "that for and notwithstanding any act, matter, or thing done by *J. Brymer*, it shall be lawful to and for *A. Belcher*, his executors, &c., to have, hold, receive, take, and enjoy the sums of money, debts, and premises thereby assigned, without any let, suit, interruption, or denial of him the said *James Brymer, his executors or administrators*, or any person rightfully claiming or to claim by, from, through, under, or in trust for him or them." The objection is, that the act of receiving the money being an act done by *Alexander Brymer*, the executor of *James Brymer*, is not within the covenant; that the covenant is confined to acts done by *James Brymer*, and does not extend to any act done by his executor. But an action lies against an executor or administrator "upon every contract or *covenant* made by

executor cannot perform, *Hyde* v. *Dean and Canons of Windsor* (*a*). The covenant in this case is, that *Belcher* shall receive, without the interruption of *James Brymer*, his executors, or any person rightfully claiming under him or them. *Alexander Brymer* claimed and received the money in the character of executor. The Navy Board have attended to no claim that was not made by, from, through, or under *James*, with whom they contracted. If the construction contended for were to prevail, the consequence would follow that the covenant might be nugatory. Suppose *James Brymer* had died the day after the execution of the deed, and large sums had been due on these contracts from the Navy Board, and his executors had received those sums, *Belcher* could not have recovered them. That never could have been the intention of the parties. It being shewn that the covenant reaches the executor, this is to be considered as if he, the executor, had covenanted that the plaintiff should receive the money without any interruption. The breach therefore is well assigned; the covenant names the executor, and the breach is, that the executor interrupted. Upon this point they cited *Harwood* v. *Hilliard* (*b*), *Anonymous* (*c*), *Penning* v. *Lady Plat* (*d*), *Bellamy* v. *Russell* (*e*). But even if the breach be too general, it shall be aided after verdict for the plaintiff, *Knight* v. *Leach* (*f*).

Denman, *Brodrick*, and *Manning* contrà. First, the judgment ought to be arrested, because the covenant on which the first breach is assigned applies to acts done by

(*a*) *Cro. Eliz.* 552.
(*b*) 2 *Mod.* 269.
(*c*) *Skin.* 39.
(*d*) *Cro. Jac.* 583.
(*e*) *Sir. T. Jones*, 186.
(*f*) *Comb.* 204.

1828.

BELCHER against RICE.

the testator only, and not to acts done by his executor; and the breach assigned is in respect of an act done by the executor. The covenant is, "that for and notwithstanding any act done by *James Brymer*, it shall be lawful for *Belcher* to receive the money without any let or interruption of him *James Brymer*, his executors, &c." The testator binds himself and his executors against any act done by him *James Brymer* in his lifetime. [Lord *Tenterden* C. J. Must not the words "for and notwithstanding any act done," be rejected as insensible, they being wholly inconsistent with the subsequent part of the covenant by which *Brymer* agrees that *Belcher* shall receive the money without the interruption of him or his executors?—*Bayley* J. May not the meaning be for and notwithstanding any act done before the execution of the deed?] The words are not in the past tense. The particular sense of those words must be collected from the context. Upon this point they cited *Rich* v. *Rich* (*a*), *Broughton* v. *Conway* (*b*), *Ford* v. *Wilson* (*c*), *Nind* v. *Marshall* (*d*). The objection to the second and third breaches is stronger. In the covenants on which those breaches are assigned, *Brymer* covenants merely for the act of himself, it is the same thing as if he covenanted

independently of the deed, and must be recovered in an action for money had and received. The arbitrator has found three distinct classes of sums received, the first on account of a contract in which *Belcher* was solely interested; that sum also belongs to *Belcher* independently of any covenant, and cannot, therefore, be recovered in this action; the second, on account of contracts in which they were jointly interested; and the third, on account of contracts in which *Brymer* was separately interested. The intention of the parties must undoubtedly be collected from the whole deed. The difficulty is created by the introduction into the recitals of the unnecessary words "*respectively or either of them;*" for if full effect be given to those words, the construction must be that the deed extends to separate contracts. Such a construction is, however, at variance with the general intention of the deed. If those words be rejected as surplusage, then all the provisions of the deed will be consistent with each other, and it will be clear that all that was intended to be assigned was the interest of *Brymer* in those contracts in which he and the plaintiff *Belcher* were jointly interested. The primary object of the deed was to dissolve and determine the partnership of *Belcher* and *J. Brymer*, in contracts for victualling his Majesty's navy. It is true that the deed recites that it had been agreed to dissolve and determine the copartnership entered into by them for carrying on the business of the said contract and all *other* contracts in which *they or either of them* were in any ways interested or concerned. The words "or either of them" here introduced, are insensible, and must be rejected, because there could not be a partnership in a contract in which one only

was

1828.

BELCHER against BREE.

was interested. The deed then recites, that *James Brymer's* share in the property belonging to the partnership should be estimated at 50,000*l.*, and should be taken by *Belcher* at that sum. That was the calculated value of *Brymer's* interest in the partnership property. It follows, therefore, that no consideration was paid to *Brymer* for his interest in the separate property. It is true, that in the clause of indemnity, the words "*or either of them*" again occur, but those words must be rejected, and then that clause will correspond with the general intention of the deed. By the operative part of the deed, the parties dissolve and determine the said copartnership so entered into, and now or lately subsisting between them for supplying his Majesty's ships with provisions under or by virtue of the said recited contract, and of all other contracts in which the said *James Brymer* and *Andrew Belcher, or either of them*, had any interest or concern. Now, though the words "*or either of them*" occur here, the dissolution must have reference to contracts in which the parties were jointly concerned. By the assigning part of the deed, *Belcher* is to have the share of *Brymer* in all the debts due and owing to them (not to *either* of them)

[redacted]

a power of attorney is conclusive to shew that the separate interest of *James Brymer* was not intended to be conveyed.

Lord TENTERDEN C. J. I am of opinion that the plaintiff is entitled to recover the whole sum upon the first breach. The principal question depends on the construction of the deed, and in deciding it, we must not merely consider the situation of the parties before the execution of the deed, but the situation in which they chose to place themselves by that deed. The arbitrator in his award states, that *James Brymer* and *Belcher* (the plaintiff) had been concerned in conducting business together as contractors for the navy; that in some contracts *James Brymer* was solely interested as contractor, in other contracts the plaintiff was solely interested as contractor; in some they were jointly interested as partners and contractors; they both, however, had been concerned in all the contracts, for the plaintiff had been agent in managing those contracts in which *Brymer* was solely interested, and *Brymer* had been agent in managing those contracts in which the plaintiff was solely interested. Under these circumstances, on the 10th of *March* 1814, they dissolve partnership by the deed set out in the award. After stating the dates of the several contracts, and the sums due from the Navy Board and received by *A. Brymer* upon them respectively; the arbitrator states, that it was contended before him that under the true construction of the deed all these several contracts were constituted by the parties as between themselves partnership contracts, and were included in the provisions of the deed. I can easily understand why they should wish to do this.

1828.

BELCHER against SEKER.

this. Unless something of this kind was done, it would have been necessary to take an account of every contract in which they were separately concerned, and in which the relation of principal and agent subsisted between them. That not having been done, it may reasonably be supposed that the parties might, in order to put an end to all contracts, elect to consider all contracts as partnership concerns; and looking to the whole of this deed, I think that intention may be collected from its different recitals and provisions. The deed recites a contract then in esse, which had been made in *May* 1813, and that the plaintiff and *Brymer* on the 17th of *September* 1813 agreed to dissolve the copartnership for carrying on the business of the said contract, and all other contracts entered into with the commissioners for victualling the navy by *Brymer* or the plaintiff, and in which they *or either of them* were in any ways interested or concerned; *and all other copartnerships whatsoever subsisting between them*. These latter words must mean partnerships in other contracts besides those entered into with the commissioners of the navy. It seems to me from the recital, that there was a manifest intent to treat all the contracts as having been copartnership

1828.

BELCHER *against* SIKES.

by reason of his having entered into the recited contract, and by reason of all other contracts entered into by *Brymer* and the plaintiff respectively, and in which they *or either of them* had any interest or concern." Now, why should *Belcher* become bound to indemnify *Brymer* against all damages by reason of the separate contracts of *Brymer*, unless the intent of the deed was that all the separate contracts of *Brymer* should, as between the parties, be considered as joint contracts? Then by the operative part of the deed, the parties dissolve the copartnership entered into between them for supplying his Majesty's ships, under or by virtue of the *recited contract* and all other contracts in which they or *either of them* had any concern. Strictly speaking, there could not have been a partnership in a contract in which one party only was interested. But the parties (who had been partners in some contracts) might have agreed that between themselves, all the contracts which either had entered into in his own name and on his own account, should be considered partnership contracts. They then release each other from all actions, &c. not only in respect of the recited contract, but of all other contracts in which *Brymer* and the plaintiff, *or either of them*, had any interest whatsoever. The release, therefore, extends to contracts in which *Brymer* was separately interested. Then come the words of assignment, *Brymer* assigns to the plaintiff all the share and interest of him *Brymer*, of and in all the debts then due and owing to them the plaintiff and *Brymer* by virtue of the same several contracts or otherwise; and all bonds and bills relating to the said contract, debts, and sums of money, or any of them; and of and in all other the monies of or belonging to the plaintiff and *Brymer* as such copartners respectively,

and

1828.

Brymer against Burn.

and all the right, title, and interest, property, claim, and demand whatsoever of him *Brymer*, of, in, to, from, out, or in respect of *the premises*. The subject matter of the assignment is there described by words of reference. We must look back to the antecedent parts of the deed, to learn what those words refer to, and then it appears that the interest of *Brymer*, in respect of *the premises*, comprehends his right to receive any sums due from government in respect of the contracts, in which he had been separately interested. My opinion is, that whatever may have been the interest of the parties originally in the several contracts, they did by this deed consent to be considered as copartners, from the first, in all contracts entered into by both conjointly or by either of them on his separate account, and that they adopted this as the best mode of settling their disputes. The remaining question is, Whether the breach of covenant is well assigned? The breach is, that the executor of *James Brymer* received from the commissioners of the navy a sum of money in respect of the contracts mentioned in the deed, and thereby prevented the plaintiff from receiving the same. The objection is, that the covenant extends only to acts done by *Brymer*

assigned by the indenture without the interruption of *James Brymer*, his *executors*, or *any persons* claiming under him or them. They cannot both stand without making the covenant insensible. One or the other, therefore, must be rejected, and I think that as the subject matter of this covenant is one in respect of which an executor is generally liable, the words "for and notwithstanding any act done by *James Brymer*," ought to be rejected; and then the covenant will be that *Belcher* shall receive the money without the interruption of *James Brymer*, or his executors; and the breach is well assigned. The rule for setting aside the award and arresting the judgment must therefore be discharged.

BAYLEY J. I think that the arbitrator has properly decided that those contracts which were not originally partnership contracts, were made so by the parties when they executed this deed. At the time when the deed was executed, there had been some contracts in which the parties had been jointly interested, and others in which each of them had been separately interested; but in the latter, one of the parties had acted as agent for the other. They were in some degree concerned together in all contracts. This being the state of things at the time when the deed was executed, it would have been necessary to make a provision that there should be taken an account of the sums each partner was entitled to receive on the joint as well as on the separate contracts in which one had acted as agent for the other. If this deed had not been intended to embrace all the contracts, it would undoubtedly have made provision for the winding up of the accounts between the parties, or at least it would not have altogether

1828.

Bulcher against Sims.

altogether prevented such a future settlement of accounts. Now the clause by which it is stipulated that mutual releases shall be given, shews clearly that it was the intention of the parties that there should be no future reckoning or accounting between the parties. By that clause each party discharges the other from all accounts, reckonings, &c. which either of them had or might *thereafter* have, for or by reason or on account of the said copartnership, or on any other *account* whatsoever." This clause entirely prevents all future reckonings between the parties upon any contract entered into by one or the other. It is quite clear, that but for this clause there must have been reckonings between the parties. It, therefore, explains the rest of the deed, and shews clearly that the word *respectively* and the words *or either of them*, which occur frequently in the deed, were introduced intentionally, and not by mistake. It seems to me, therefore, that the plaintiff was entitled to receive all monies due from the Navy Board on contracts in which *Brymer* was either separately or jointly interested. I think also that *Alexander Brymer*, the executor of *James Brymer*, having wrongfully received the money which the plaintiff ought to

1828.

BELCHER *against* SIKES.

any act, deed, matter, or thing done by *James Brymer*," if they had stood by themselves would have confined the covenant to acts done by him only. The words "without the let, suit, or interruption of him *James Brymer*, his executors, or administrators," &c. extend the covenant to acts done by his executors. They are clearly sufficient to make his estate responsible; and if it were necessary, in order to make the covenant consistent, to reject any of the words, I should be disposed to reject the first words rather than the latter. I entertain more doubt as to the second and third breaches; but it is unnecessary to decide whether they are good or not. Then it is said that *Belcher* is only entitled to recover a moiety. I think it is not necessary that an action for money had and received should be brought, or a bill in equity should be filed, in order to enable the plaintiff to recover the sums due to him in his own right, independently of any covenant in the deed; inasmuch as the whole is mixed up together, and the damages are entire. But I own I have considerable doubt as to the true construction to be put on this deed. I admit that it is reasonable that the supposed arrangement should have taken place. I doubt, however, whether the language of the deed is sufficient to effect such a purpose. It is a rule in construing deeds to give effect to all the words, and undoubtedly if full effect be given to the words "*or either of them*," there is an insuperable objection to any other construction of the deed than that put upon it by my Lord and my Brother *Bayley*. But the language of the operative part of the deed is at variance with such a construction. The parties by mutual consent dissolve the copartnership for supplying his Majesty's

1828.

BELCHER against SIKES.

ships with sea provisions under or by virtue of the said recited contract, and of all other contracts in which the said *A. Belcher* and *James Brymer* had any interest or concern. Now how could they dissolve a partnership in a contract in which one only was interested? Besides, 50,000*l.* was the consideration paid to *Brymer* for his assigning his interest to *Belcher* in the property belonging to the partnership. There was no consideration for his assigning his interest in the separate contracts. From these parts of the deed I should think it was not intended to include contracts in which either party was separately interested. But, on the other hand, there is a difficulty created by the indemnity clause; for *Belcher* is to indemnify *Brymer* against all claims made by government in respect not only of the joint but of the separate contracts. That clause rather shews that the interest of *Brymer* in the separate contracts was in the contemplation of the parties. And when I find the words "or either of them" occurring so frequently in this deed, I cannot say that I differ from my Lord and my Brother *Bayley*, but only that I entertain considerable doubts.

Rule discharged. (*a*)

[redacted]

1828.

GROOCOCK *against* COOPER and Others.

Saturday, May 17th.

By the 6 *G.* 4. *c.* 16. *s.* 33. commissioners of bankrupt are authorised, by writing under their hands, to summon before them certain persons; and if any such person so summoned shall not come before them at the time appointed, having no lawful impediment made known to them at the time of their meeting, and allowed by them, it shall be lawful for them, by warrant under their hands and seals, to authorise the person therein named to apprehend such person, and bring him before them to be examined: Held, that in order to justify the commissioners in issuing their warrant for the apprehension of of a witness to whom they had directed a summons, it was necessary that a reasonable time should intervene between the service of the summons and the time when the witness was thereby required to attend, and that the question, whether the service of the summons was in that respect reasonable or not was a question of fact to be submitted to a jury. Semble, That the commissioners are not bound to have information on oath of the service of the summons before they issue their warrant, but that it is sufficient if the summons be actually served.

TRESPASS for false imprisonment, brought by the plaintiff against the defendants, who were commissioners under a commission of bankrupt issued against Messrs. *Silvey* and *Sanderson*. At the trial before Lord *Tenterden* C. J., at the *London* sittings after *Trinity* term, 1827, it appeared, that on *Monday*, the 17th of *April* 1826, at five o'clock in the evening, the plaintiff was served in *London* with a summons, whereby he was required to attend before the defendants at *Norwich* on the following morning at ten o'clock, to give evidence before the commissioners under the commission against *S.* and *S.* The plaintiff told the person who served the summons that it was impossible for him (the plaintiff) to attend on so short a notice, as he had an engagement to attend a gentleman from the *West Indies* (whom he named) on the following morning, to select goods for the *Demerara* market, and that he and that gentleman had also to prove a will under which they were joint executors, and desired the person who served the summons to write down to the commissioners to inform them of the reasons why he could not attend. Before the person who served the summons left the plaintiff, he tendered him *5l.* for his expenses in obeying the summons. The plaintiff also told the person who served

1828.

GROCOCK against COOPER.

the summons, that if any day after *Wednesday* in the following week were appointed he would attend, and begged that information to that effect might be sent to the commissioners. The plaintiff was then asked, whether the *Friday* following would suit, and he replied it would not. The *London* agents to the solicitors to the commission wrote a letter on the evening of the next day (*Tuesday* the 18th of *April*) to the commissioners, and informed them of the service of the summons, and of the grounds assigned by the plaintiff for not attending; and the commissioners having received the letter on *Wednesday*, the 19th of *April*, signed a warrant for taking the plaintiff into custody, and he was taken into custody, by virtue of that warrant, on *Thursday* the 20th of *April*, and conveyed down to *Norwich*, and detained in custody until his examination was closed. It was proved that four coaches left *London* for *Norwich* daily, after five o'clock in the evening. It was admitted that the plaintiff was a person liable to be summoned, within the 6 *G.* 4. *c.* 16. *s.* 33. (*a*);

(*a*) Sect. 33. of the 6 *G.* 4. *c.* 16. enacts, "that after adjudication, it shall be lawful for the commissioners, by writing under their hands, to summon before them any person known or suspected to have any of the estate of the bankrupt in his possession, or supposed to be indebted to the bankrupt, or any person whom the commissioners believe capable of giving

but it was contended, on the part of the plaintiff, that the defendants were not justified in issuing their warrant, inasmuch as the summons was not sufficient, there not having been a reasonable time, between the service of the summons and the return, for the plaintiff to go down to *Norwich*, and, at all events, that this was a question of fact to be submitted to the jury. Secondly, that the warrant itself was illegal, because the defendants had granted it without having before them any information on oath of the service of the summons; and, thirdly, that the sum of 5*l.* tendered to the plaintiff for his expenses was not sufficient. Lord *Tenterden* C. J. was of opinion that it was not necessary that the commissioners should have information before them on oath of the service of the summons, to justify them in issuing the warrant; that in a superior court such information on oath was necessary; but no action would lie against a judge of such a court for unlawfully issuing a warrant. Whereas, if a party were arrested on an unlawful warrant issued by commissioners of bankrupt, he might have redress against them by an action at law. If a summons was, in fact, served, and no lawful impediment was made known to and allowed by the commissioners, their warrant in this case was lawful. If they acted on a mere supposition that the summons had been served, they did so at their peril; but if such a summons had been served, and there was no lawful impediment made known to them, they would be justified. Here the summons was in fact served; and the only question was, Whether any lawful impediment was made known to and allowed by the commissioners? It seemed from the word *allowed* that they had a discretion vested in them to say whether the impediment made known to them was sufficient or not.

1828.

GROOCOCK *against* COOPER.

But was any lawful impediment even made known to them? The commissioners were informed by the letter that the plaintiff had alleged private business as a ground for not complying with the summons. But if his private affairs did, in fact, require his attention, that was not a sufficient impediment. The defendant might have reached *Norwich* before the return of the summons; and it was never suggested to the commissioners that the state of his health prevented his performing the journey within the time. Then there was no lawful impediment, and the warrant was therefore legal. On these grounds his Lordship directed a nonsuit. *Campbell* in last *Michaelmas* term obtained a rule nisi for setting aside the nonsuit, on the grounds urged at the trial.

The *Solicitor-General* and *Alderson* on a former day in this term shewed cause. The nonsuit was right. The plaintiff ought to have made known to the commissioners at their meeting some lawful impediment, and that ought to have been allowed by them. Here the only impediment made known to the commissioners was, that the plaintiff had private business to transact. That was no lawful impediment. He did not allege that he was prevented by ill

[redacted]

Then as to the third point, that the sum of 5*l.* only was tendered to the plaintiff: he made no objection at the time to the amount of the tender, and this was not an impediment made known to the commissioners. Besides, *Battye* v. *Gresley* (*a*) is an authority to shew that it is not necessary, upon summoning the witness, to tender his expenses before hand; though if he be, in fact, without the means of taking the journey, it may be an excuse for not obeying the summons.

Sir *J. Scarlett* and *Campbell* contrà. By the 6 *G.* 4. *c.* 16. *s.* 33., the commissioners are authorised to *summon* all persons therein described; and if any such person so *summoned* shall not come before them at the time appointed, having no lawful impediment made known to the commissioners at the time of the meeting, and allowed by them, the commissioners may issue their warrant. The act, therefore, requires that the party shall be summoned in a lawful manner. Here the plaintiff was not summoned within the meaning of the act of parliament; and if he was not duly summoned he was not bound to make any excuse for not attending. This case must be considered, therefore, as if he had made none. Suppose a motion were made for an attachment for not obeying a subpœna, it would be necessary to shew that the subpœna had been served, so as that the party whose attendance as a witness was required might reasonably be expected to attend. Then the question in this case is, whether the plaintiff, who was summoned at five o'clock in the evening, could reasonably be expected to attend at *Norwich* at ten o'clock the next

(*a*) 8 *East*, 319.

1828.

GROOCOCK against COOPER.

morning? Was he bound to neglect all his other business? Suppose he were infirm or in ill health, would he, in order to reach *Norwich* at the hour appointed, be bound to travel during the night? And, at all events, whether the service of the summons were reasonable or not was a question of fact which must depend on a variety of circumstances, as the sex, age, or state of health of the party summoned. It ought to have been submitted to the jury, whether, with reference to all the circumstances, the plaintiff could reasonably be expected to comply with a summons (served at five o'clock in the evening) requiring him to attend at ten the next morning at *Norwich*. Assuming that the service of the summons was reasonable, the commissioners ought to have had information on oath of the service of the summons. A magistrate has no power to commit for an offence without information on oath, *Morgan* v. *Hughes* (*a*). [*Bayley* J. The only question there was whether case or trespass was the proper form of action.] Lastly, the defendant was not bound to obey the summons without a tender of a sum of money sufficient to defray his reasonable expenses in going to and returning from *Norwich*, and 5*l.* was not enough.

Cur. adv. vult.

[redacted]

1828.

GROOCOCK *against* COOPER.

ought to prevail; but the ground upon which we think that there ought to be a new trial is, that I ought not to have taken upon myself to decide that the summons which was served on the plaintiff on *Monday* evening at five o'clock, and by which he was required to attend at *Norwich* on the following morning at ten, was properly served. We think it was a question for the jury to say, whether, under all the circumstances of the case, the service of the summons was reasonable or not. And in order that that question may be submitted to their consideration, the rule for a new trial must be made absolute.

Rule absolute for a new trial.

HARROD *against* ELIAH WISEMAN BENTON.

Monday, May 19th.

The Court will, upon motion, set aside a warrant of attorney, judgment, and execution, on the ground that they are fraudulent against creditors, provided the facts upon which the alleged fraud depends are clearly made out by the affidavits; but where those facts are disputed, they will direct an issue to try the question of fraud.

A RULE nisi had been obtained in this case, calling on the plaintiff and defendant respectively to shew cause why the warrant of attorney given to the plaintiff, and the judgment and execution and all proceedings thereon, should not be set aside, and why the goods taken under such execution should not be sold by the sheriff in satisfaction of an execution issued at the suit of *Mary Ann Hill Benton;* or if the same had been sold by the sheriff, why the proceeds thereof should not be paid over for the like purpose, and why the plaintiff or defendant should not pay the costs of this application. It appeared by the affidavits in support of the rule, that *Mary Ann Hill Benton* had recovered a verdict in the Court of Common Pleas for 60*l.* against the defendant at the sittings after *Hilary* term, 1828, and had signed judgment on the 28th of *April* in that year. The plaintiff had also signed his judgment in this Court against the defendant

1828.

HARROD against BENTON.

defendant on that day by virtue of a warrant of attorney executed on the 24th of *April*, but purporting to bear date on the 1st of *January*. Upon the affidavits on both sides it was a disputed question of fact, whether the warrant of attorney was given to the plaintiff without consideration, and whether the judgment and execution thereon were or were not fraudulent, as intended to anticipate and defeat the levy which it was known was about to be made on behalf of *Mary Ann Hill Benton*.

Comyn shewed cause. The Court will not upon motion decide the question whether the warrant of attorney given to the plaintiff and the judgment and execution thereon were fraudulent, this being an application not by the party giving the warrant of attorney or his representative, but by a stranger, an execution creditor. There is no instance in the books of such an application; that question ought to be submitted to a jury. The plaintiff (*M. A. H. Benton*) in the second execution, who has obtained the present rule, may indemnify the sheriff, and then the question whether the warrant of attorney was fraudulent may be tried by the present plaintiff in an action against the sheriff for a false return, *Warmoll* v. *Young* (*a*); and

if it appear that the other execution has no foundation in a bonâ fide debt, but that the whole is fabricated for the express purpose of defeating a just claim. There may be no decision exactly in point, but from the principles laid down in several cases, it is clear the Court has the power to determine the question without the intervention of a jury; and the courts of equity have in some instances so determined without sending the question to be tried in an issue, *Lady Arundell* v. *Phipps and Taunton* (*a*), *Taylor* v. *Jones* (*b*), *Baldwin* v. *Cawthorne* (*c*), *Meggott* v. *Mills* (*d*).

Lord TENTERDEN C. J. There can be no doubt that if the warrant of attorney, judgment, and execution, were not bonâ fide, they will be void against creditors. The question whether they were fraudulent or not might perhaps be tried in an action against the sheriff for a false return; but it is hard upon the sheriff that that question should be tried at his expense. I think that as the facts upon which the alleged fraud depends are disputed, the question ought to be decided by a jury on an issue to be settled between the parties, though I am clearly of opinion that the Court has the power to determine this question upon motion where we are satisfied and convinced that the alleged fraud has been actually committed. But this rule may be enlarged until the matter can be tried by a jury. I think the Court has a jurisdiction over the warrant of attorney, which it may exercise at the instance of any party who has any interest in supporting it or in setting it aside.

(*a*) 10 *Ves.* 139.
(*b*) 2 *Atk.* 600.
(*c*) 19 *Ves.* 166.
(*d*) 1 *Ld. Raym.* 286.

It

1828.

HARROD *against* BRITON.

It was afterwards agreed, at the suggestion of the Court, that it should be referred to the Master to enquire into the validity of the warrant of attorney in the rule mentioned, and to report thereon to this Court next term; and it was ordered, that, in the mean time, the rule should stand enlarged, until the time of the Master's making his report.

Ex parte CULLIFORD *against* WARREN, Gent., one, &c.

The Court will not compel an attorney to pay a sum of money he has received in his character of attorney; he having after the receipt of the money become bankrupt and obtained his certificate.

SIR *J. SCARLETT* had obtained a rule, calling upon the defendant, an attorney, to shew cause why he should not pay over a sum of money paid by *Culliford* to him, as his attorney, being the amount of interest of a mortgage procured by *Warren* in 1823, for *Culliford*, and which it was his duty to have transmitted to the mortgagee. It appeared, by the affidavits against the rule, that after the receipt of the money by the attorney for the purpose alleged, there had been a treaty for transferring the mortgage, and that he had promised

[redacted]

1828.

CULLIFORD *against* WARREN.

the Court; but that *Cullifford* ought to be left to his remedy at law, and come in with the general creditors.

Lord TENTERDEN C. J. We see nothing in this case which ought to deprive the attorney of the privilege of his certificate.

BAYLEY J. If an action were brought against *Warren* for money had and received, the certificate might be pleaded in bar.

Rule discharged.

HASTELOW *against* JACKSON. (*a*)

Where *A.* and *B.* deposited money in the hands of a stake-holder to abide the event of a boxing-match between them; and after the battle *A.* claimed the whole sum from the stake-holder, and threatened him with an action if he paid it over to *B.*, which he nevertheless did, by the direction of the umpire: Held, that *A.* was entitled to recover from him his own stake, as money had and received to his use.

ASSUMPSIT for money had and received. Plea, the general issue. At the trial before *Holroyd* J., at the Summer assizes for *Nottingham*, 1827, it appeared, that the plaintiff and one *Wilcoxon* had each deposited 20*l.* in the hands of the defendant, to abide the event of a boxing-match between them. The battle was fought, and a dispute arose as to which was the winner; two referees and an umpire were chosen, who decided in favour of *Wilcoxon*. The plaintiff then claimed the 40*l.* from the defendant, and gave him notice that if he paid it over to *Wilcoxon*, he should bring an action to recover it. The defendant, however, afterwards, acting upon the decision of the umpire, paid over the money. At the trial the plaintiff claimed only the 20*l.* deposited by him; and for the defendant it was contended,

(*a*) The Judges of this court sat, as on former occasions, from *Tuesday, May* 20th, until *Thursday, June* 5th, inclusive. During that period this and the following cases were argued and determined.

1288.

HARTLOW against JACKSON.

tended, that the plaintiff could not recover at all, for he had never given notice of an intention to rescind the illegal wager, but had affirmed it, by claiming the whole of the stakes, and insisting that he was the winner of the battle. The learned Judge overruled the objection, and the plaintiff had a verdict for 20*l.* In *Michaelmas* term a rule nisi for a new trial was granted, against which

N. R. Clarke shewed cause. It has now been determined, by each of the courts of law in *Westminster Hall*, that money deposited in the hands of a stake-holder, to abide the event of an illegal wager, may be recovered at any time before it has been paid over, *Cotton* v. *Thurland* (*a*), *Smith* v. *Bickmore* (*b*), *Bate* v. *Cartwright* (*c*). Here the money must be considered as still in the hands of the defendant, for he had express notice from the plaintiff not to pay it over. It is true that in *Smith* v. *Bickmore* the plaintiff demanded only the sum deposited by himself; whereas, in the present case, the plaintiff demanded the whole sum. But in *Bate* v. *Cartwright* the plaintiff sought, even at the trial, to recover the whole; and was, nevertheless, allowed to recover back his

[redacted]

desires to rescind the contract, it may be recovered as money had and received by the stake-holder to the use of the party who deposited it. But there is no case, except *Lacaussade* v. *White* (*a*), in which the money has been recovered, where it had been paid over before such notice was given. Now the decision in *Lacaussade* v. *White* proceeded upon the mistaken notion that the action was against the stake-holder, and that the money was still in his hands. In *Howson* v. *Hancock* (*b*), Lord *Kenyon* expressly states that to have been the ground of his former judgment; and in the latter case, the money having been paid over, it was held that it could not be recovered back. [*Bayley* J. According to my note of *Howson* v. *Hancock*, it proceeded entirely on the ground that the plaintiff had expressly assented to the money being paid over.] The party to an illegal wager, at the time when he deposits his money, assents to its being paid over to the winner; but there is a locus pœnitentiæ; and if before the money has been paid over he avails himself of that, and desires to be released from the illegal bargain, he can insist upon having his own money returned. Here, however, the plaintiff never repented of the bargain originally made; he never retracted the assent originally given that the money should be paid to the winner, but he asserted himself to be the winner, and on that ground claimed the whole sum deposited. An umpire was appointed to decide that, and according to his decision the money was paid. The cases upon illegal insurances are analogous to this. In a great variety of instances it has been held, that the premium could not be recovered back after the voyage had been performed, although the underwriters would

(*a*) 7 *T. R.* 535. (*b*) 8 *T. R.* 575.

not

1828.

HARTELOW against JACKSON.

not have been liable on the policy in the event of a loss, *Lowry* v. *Bourdieu* (*a*), *Andree* v. *Fletcher* (*b*), *Morck* v. *Abel* (*c*), *Vandyke* v. *Hewitt* (*d*), *Lubbock* v. *Potts* (*e*). Again, the defendant in this case received money to be paid over to the winner; and *Wilcoxon* being winner might have sued him for it, and the defendant could not in answer have set up the illegality of the contract, *Tenant* v. *Elliott* (*f*), *Farmer* v. *Russell* (*g*). [*Holroyd* J. If so, I must have tried which was the winner, but that I was not bound to do.]

BAYLEY J. I am of opinion that this rule must be discharged. The cases of *Tenant* v. *Elliott* and *Farmer* v. *Russell* do not prove that the winner of an illegal wager can recover the whole of the stakes from the holder, but only that when the loser has paid the money into the hands of an agent for the winner the agent cannot set up the illegality against the claim of his principal. Those cases may, therefore, be laid out of consideration; and from all the others which have been cited it appears that there is a material difference between actions by one party to an illegal contract against the other, and those against a stake-holder. If

1828.

HASTELOW against JACKSON.

to the contrary except that of *Lacaussade* v. *White*, which cannot, I think, be supported; and indeed it appears to have proceeded on the supposition that the defendant was a stake-holder, in which case it would have been right. It is too late now to consider what would have been the best rule on this subject. It might have been proper to say that the party to a wager on an illegal act, after he had done the act, should not recover his stake. But *Cotton* v. *Thurland*, followed by *Smith* v. *Bickmore*, has established that, notwithstanding the event has been decided, and the party has concurred in doing the illegal act, he shall be allowed to recover his own stake. The case of *Smith* v. *Bickmore* was decided long after the other, and at a time when the distinction had been taken between actions against the party and the stake-holder; and it is now a settled rule that where a wager has been laid on the event of a boxing-match either party may recover his own stake from the holder. It has been urged that a decision for the plaintiff in the present case would go beyond all former cases, for that the money had been paid over before the action was brought, and the plaintiff had done no act to rescind the wager, nor had ever intimated that he claimed his own money, and that only. But if a stake-holder pays over money without authority from the party, and in opposition to his desire, he does so at his own peril. In *Howson* v. *Hancock* the jury found that the money was paid with the assent and concurrence of the plaintiff; the decision, therefore, merely amounted to this, that where money has been paid over with the assent of the party, he cannot get it back. Here, it is true, the whole was demanded: the defendant said he should pay it to

1828.

HASTELOW against JACKSON.

the other party, the plaintiff desired him not to do so, and threatened him with an action. That was a plain expression of dissent; the defendant therefore paid over the money at his own peril, and having paid over what could not have been recovered from him, he paid it in his own wrong. *Wilcoxon* could not have recovered more than his own money, without proving himself the winner, and that could only be established by evidence of his having done an illegal act. He therefore could not have recovered the money deposited by the plaintiff; and the defendant having paid over the whole after the plaintiff's prohibition, which was valid as to a moiety of the stakes, paid over that moiety wrongfully, and is liable to refund it to the present plaintiff. For these reasons, I think the opinion expressed by my brother *Holroyd* at the trial was correct, and that this rule must be discharged.

HOLROYD J. It appears to me now as at the trial, that the case of payment to a stake-holder differs from that by one party to the other. The question made at the trial was, whether it was necessary for the plaintiff to rescind the contract. I think it was not; and that

1828.

HASTELOW *against* JACKSON.

pute, that is considered as a complete execution of the contract, and the money cannot be reclaimed; but if the event has not happened, the money may be recovered. With respect to a stakeholder there is a third case, viz. where the event has happened, but before the money has been paid over, one party expresses his dissent from the payment. Under such circumstances he may recover it; and perhaps it may then be said, that although the event has happened, yet the contract is not completely executed until the money has been paid over, and therefore the party may retract at any time before that has been done.

Rule discharged.

The KING *against* The Inhabitants of WAINFLEET ALL SAINTS.

Since the 59 *G.* 3. *c.* 50. a settlement may be gained by a residence of forty days in a parish, provided the party comply with the conditions mentioned in that act. And, therefore, where a pauper, since that statute, hired land for a year at the sum of 10*l.*, and paid that rent, and occupied the land for the whole year, but resided only forty days in the parish, and not upon the land, it was held, that he gained a settlement.

UPON an appeal against an order of two justices for the removal of *B. Markwell*, his wife and children, from the parish of *Wainfleet All Saints* in the parts of *Lindsey*, in the county of *Lincoln*, to the parish of *Horncastle* in the same parts and county, the sessions quashed the order, subject to the opinion of this Court on the following case.

The pauper, *B. Markwell*, previously to *Lady-day* 1822, hired from his wife's mother seven acres of land, situated in the parish of *Horncastle*, which she then rented at the yearly sum of 8*l.* 1*s.* 6*d.*, and for which the pauper agreed to pay her the same rent, *and* 3*s. per week in addition*, his tenancy to commence from the ensuing *Lady-day*. No time was specified for which the pauper agreed to take the land, but he occupied it from the

1828.

The King against The Inhabitants of Wainfleet.

Lady-day before mentioned for three years, and paid the several rents as they became due; and he resided and slept in a house in the same parish (of *Horncastle*) for upwards of forty days and nights, in the year immediately subsequent to the said *Lady-day* 1822. The question for the opinion of this Court was, whether this taking, followed by the occupation stated, was sufficient, within the 59 *G.* 3. *c.* 50., to entitle the pauper to a settlement in the parish of *Horncastle*.

Clarke and *Hildyard* in support of the order of sessions. The land was not taken for a year. It is true, that where a yearly rent only is reserved, a yearly tenancy is to be presumed. But here there was also a weekly rent reserved, which of itself would raise a presumption of a weekly tenancy. There is as much reason for presuming the one as the other, and it is incumbent on those who are against the order of sessions, to shew that the land was taken for a year. But it could not be hired by the pauper for a year, because his mother was tenant only from year to year, and could not give to the pauper an interest in the land for the year commencing on a future day. Besides the pauper never

1828.

The KING *against* The Inhabitants of WAINFLEET.

rented at a yearly rent, and that he agreed to pay her that yearly rent, and also a weekly rent of three shillings. Primâ facie, a general hiring must be presumed to be a yearly hiring (*a*), and that presumption is the stronger where the subject matter of the hiring is land, because land varies in its value at different periods of the year. It is said that the mother's estate was determined at the end of the current year, and that she could not, therefore, convey to the pauper an interest for a year commencing on a future day. But the mother was tenant from year to year. She had an interest, therefore, which would continue beyond the year, unless something was done to determine it, viz. unless six months' notice to quit was given. That interest she conveyed to her son. I think, therefore, that the land in this case was hired for a year. The other objection is, that no settlement was gained, because the pauper did not reside on the land, although he resided in the parish; and, secondly, that he did not reside in the parish for a year. Before the 59 *G.* 3. *c.* 50. actual residence in the parish for forty days upon a tenement of the yearly value of 10*l.* conferred a settlement, although the party did not pay any rent for the forty days. But the 59 *G.* 3. *c.* 50. altered the law in that respect, and the language of that statute must be abided by as nearly as possible. That statute enacts, that no person shall acquire a settlement in any parish by reason of dwelling for forty days in any tenement rented by such person, unless certain conditions therein mentioned be complied with. It seems, therefore, that residence for forty days will be sufficient to confer a settlement, if the other requisites of the act be complied

(*a*) *Doe* v. *Brown*, 8 *East*, 165. *Doe* v. *Watts*, 7 *T. R.* 83.

1828.

The King against The Inhabitants of Wainfleet.

with. Now it requires, among other things, if the tenement consist of land, that it should be hired and occupied for the term of one year at and for the sum of 10*l.*, and that the rent for that period should be paid. Here all those requisites have been complied with. It does not appear, therefore, to be essential in this case that the pauper should have continued in the parish for the year. It is sufficient that he resided in the parish for forty days, provided he hired and occupied the land in the parish for the year, and paid the rent for that period. The pauper, therefore, gained a settlement in *Horncastle*, and the order of sessions was wrong.

Holroyd J. For the reasons given by my brother *Bayley*, I am of opinion that the land was clearly hired for a year, and that since the 59 *G.* 3. *c.* 50. a residence for forty days in a parish is sufficient to confer a settlement, provided the other requisites in that act be complied with.

Littledale J. concurred.

Order of sessions quashed (*a*).

(a) See *Rex* v. *Feeham*, ante, 92.

1828.

DOE on the demise of CHARLES WAKEMAN LONG *against* HENRY PRIGG.

Devise to *A.* for life, remainder unto "the surviving children of *W. J.* and *J. W.*, and their heirs for ever; the rents and profits to be divided between them in equal proportions, share and share alike:" Held, that the word "surviving" referred to the testator's death, and not that of the tenant for life.

EJECTMENT to recover one-seventh share of certain lands in the several parishes of *Ripple* and *Upton*, in the county of *Worcester*, which the lessor of the plaintiff claimed to be entitled to under the will of one *W. Shipman*. At the trial at the Spring assizes 1827, for the county of *Worcester*, the plaintiff was nonsuited, with liberty to move to enter a verdict for the plaintiff, if this Court should be of opinion that he was entitled to recover; and upon that motion being made in the subsequent term, it was agreed that the facts should be stated in the form of a case, as follows: — *W. Shipman* being seised in fee of the premises in question, made his will, which was duly executed and attested, so as to pass real property, and bore date the 6th day of *February* 1782; and by his will devised the premises in question with others to his mother, for *her natural life only*. And after the death of his mother to his wife for *her natural life only*. He then devised as follows: — "and from and after the decease of my mother and wife, I give and bequeath all the above-mentioned premises unto the *surviving* children of *William Jennings*, of *Buckley*, in the county of *Worcester*; and of *John Warren*, of *Phelps*, in *Twining*, *Gloucestershire*, and to their heirs for ever; the rents and profits to be divided between them, in equal proportions, share and share alike." He then devised other real property immediately to his wife in fee. The will further

1828.

Doe dem. Long against Price.

contained the following clause:—"And whereas, I now stand indebted to Mr. *John Jones*, of *Lulsley Hill*, (which said *John Jones* was the father of the testator's wife) in a considerable sum of money upon bond; now if the said Mr. *Jones* will at the time of my death give up the said bond to my executrix hereafter named (testator's wife), and not insist upon the payment of the money, all the above devises respecting his daughter stand good; but if he demands payment of the money, it is my will that all the above devises to my wife shall be void and revoked, and she shall have nothing but what was settled on her before marriage. And in that case I give and bequeath unto my mother all the above-mentioned estates, real and personal, for her natural life only. And from and after her decease to the surviving children of *W. Jennings* aforesaid and *J. Warren*, and to be divided amongst them as above mentioned."

The testator died in *August* 1785, without having altered or revoked the above in part recited will. At the time of the testator's death, there were living his mother and wife, six children of the said *W. Jennings*, and one child of the said *J. Warren*, who was a daugh-

of the death of the testator's wife in 1810, there were only four children of *W. Jennings* then surviving. The question for the opinion of the Court is, to what period the words *surviving children* shall refer.

The case was argued at the sittings after *Hilary* term, by

Curwood for the plaintiff. The expression "surviving children," in this will, refers to the period of the testator's death. If it were not so, the devise to the children would have different effects, according to the determination of the testator's father-in-law as to the bond debt; for if he claimed it, the devise in remainder would take effect on the death of the testator's mother; but if he released it, that devise would not take effect until after the death of the testator's wife. Besides, it is a general rule, that where a remainder can be taken as vested, it shall never be construed as contingent, *Ives* v. *Legge* (*a*). Here, if the devise to the children is referred to the death of the testator, it will give a vested remainder; but if to the death of the tenants for life, the remainder to the children will be contingent. *Rose* v. *Hill* (*b*) is expressly in point. There the testator devised to his wife for life, and after her decease to *A.*, *T.*, *M.*, *W.*, and *N.*, his sons and daughters, and the survivors and survivor of them; and it was held that the words, "survivors or survivor," related to the death of the testator. *Doe* v. *Lawson* (*c*) is to the same effect.

G. R. Cross contrà. It was said by Sir *W. Grant* in *Newton* v. *Ayscough* (*d*), that the operation of a devise

(*a*) 3 *T. R.* 488.
(*b*) 3 *Burr.* 1881.
(*c*) 3 *East*, 278.
(*d*) 19 *Ves.* 534.

does

1828.

Doe dem. Long against Price.

does not depend upon any technical form of words, but upon the apparent intention of the testator, collected either from the particular disposition, or the general context of the will. Now to refer the words, "surviving children," in this case, to the death of the testator, would be an unnatural construction, for it cannot be supposed that he meant to provide for a contingency to happen in his own lifetime; for he might at any time make a new disposition of his property, if any contingency happened to disturb that which had previously been done, *Hawes* v. *Hawes* (*a*). In *Stringer* v. *Phillips* (*b*), *Rose* v. *Hill*, and *Doe* v. *Lawson*, words of survivorship were certainly referred to the death of the testator; but in each of those cases the devise was to certain individuals named, and not to a class, and there were previous words, making the devisees tenants in common, and to avoid the difficulty of reconciling the two parts, the period of survivorship was referred to the death of the testator. But in recent cases the courts have leant against that construction, *Brown* v. *Bigg* (*c*). In *Hoghton* v. *Whitgreave* (*d*), the devise was to the testator's widow for life, and then to certain nephews and nieces, "the survivors or survivor of them;" and these words were held to apply to those who survived the widow. [*Holroyd* J. There the estate was to be converted from real to personal before it was divided.] In *Cripps* v. *Wolcott* (*e*), words of survivorship were referred to the period of division and enjoyment, although no change was to be made in the nature of the property.

Cur. adv. vult.

(*a*) 1 *Ves.* sen. 14
(*b*) 1 *Eq. Ca. Abr.* 292.
(*c*) 7 *Ves.* 279.
(*d*) 1 *J. & W.* 146.
(*e*) 4 *Mad.* 11

Bayley

1828.

Doe dem. Long against Price.

Bayley J. now delivered the judgment of the Court. The question in this case arose upon the will of *William Shipman*, and depended upon the effect of a limitation in remainder to the *surviving* children of *William Jennings* and *John Warren* and their heirs. By the will the testator devised to his mother for her natural life only, remainder to his wife for her natural life only, remainder to the surviving children of *William Jennings* and *John Warren*, and their heirs for ever, the rents and profits to be divided between them in equal proportions, share and share alike; but in a given event he revoked the devise to his wife, and gave to his mother for her natural life only, and from and after her decease to the surviving children of *William Jennings* aforesaid, and *John Warren*, and to be divided amongst them as above mentioned. The persons, therefore, coming within the description of "the surviving children," &c. were to take *in possession* in the one case upon the deaths both of the mother and wife, and in the other case upon the death of the mother only. The question is, when they were to take *in interest*, whether they were to take vested estates in remainder immediately upon the death of the testator, or whether their estates were to be contingent till the mother and the wife, in the one case, and the mother in the other, died. There is no doubt but that upon an ordinary limitation by way of remainder to a class, as children, grandchildren, &c. all who are in esse at the time of the death of the testator take vested (and consequently transmissible) *interests* immediately upon the testator's death, and that all who come in esse before the particular estates end, and the limitation takes effect *in possession*, are to be let in, and take a vested interest as soon as they come in esse, and that they

1828.

Doe dem. Long against Pasco.

they and their representatives will take as if they had been in esse at the testator's death. This is settled by *Baldwin* v. *Karver* (*a*), *Roe* v. *Perryn* (*b*), *Doe* v. *Dorvell* (*c*), *Meredith* v. *Meredith* (*d*), and *Right* v. *Creber* (*e*). There is no doubt also but that a limitation by way of remainder to such children, &c. as shall be in esse at the time when the particular estate ends, and the remainder is to take effect in possession, is a contingent remainder, because it depends upon the event of any of such children continuing in esse until the particular estates end. This is clear from *Roe* v. *Briggs* (*f*). Had this devise, therefore, been merely to the children of *Jennings* and *Warren*, there would have been no difficulty in the case. It would have fallen within the class of cases to which *Baldwin* v. *Karver* belongs. The difficulty arises upon the addition of the word *surviving*, and upon the meaning to be given to that word. If this word refers to the time of the death of the testator, all the children who should be living at the testator's death, and all who should come in esse before the life estate ceased, or their representatives, would be entitled, and the interests would vest in every child in esse at the testator's death, and in every one who came in esse

remainder, unless a contrary intention appears, because contingent remainders are in the power of the particular tenant, and may be destroyed; and it is more likely the testator should have intended that the limitations he made should be secure, than that they should be liable to be defeated; but where the intention is clear that the testator meant what would make the remainder contingent, his intention must prevail.

We have endeavoured, without success, to find a case exactly circumstanced as this is, where upon a devise by way of remainder *to a class*, as this is, words of survivorship have been held to apply to the death of the testator; but there are so many in which upon a devise or bequest *to individuals* they have been held so to apply, that we think we are warranted in saying that *that* is the right construction in this case. In *Wilson* v. *Bayley* (*a*), where testator bequeathed certain leaseholds for lives and years for the benefit of his two sons, *Mark* and *John*, and their issue, but if they died unmarried and without issue, his will was, that his daughters, *Mary*, *Sarah*, and *Catherine*, and the survivors and survivor of them, and their assigns, should be permitted to receive the rents, &c. as tenants in common, and not as joint tenants, the House of Lords decided that the words of survivorship amongst the daughters applied to the death of the testator, not to the death of the survivor of *Mark* and *John*; and that upon the deaths of *Mark* and *John* without issue, not only one daughter who survived them, but the representatives of two other daughters who died before them, were entitled. In *Perry* v. *Woods* (*b*), where stock was bequeathed in trust for *Ann Darby* for life, and if she died without children,

(*a*) 3 *Bro. Parl. Ca.* 198. (*b*) 3 *Ves.* 205.

the

1828.

Doe dem. Lord against Fisher.

the executors were to pay the principal to *W.* and *John Pricklow*, share and share alike, or to the survivor of them, Sir *P. Arden*, Master of the Rolls, held, that these words of survivorship applied to the testator's death, not to *Ann Darby's*; and that though *John Pricklow* alone survived *Ann Darby*, he was not entitled to the whole stock, but that the representatives of *William* were entitled to a moiety. *Roebuck* v. *Dean* (*a*) is exactly similar: 1000*l.* stock, bequeathed in trust to pay the dividends to *E. R.* for life, and after her decease the 1000*l.* to be equally divided between five, and to the survivors or survivor of them, and this was held to vest in the five, at the death of the testatrix. In *Maberly* v. *Strode* (*b*), where land was devised for sale, and the interest of the produce was to be paid to testator's son *Samuel* for life, and upon his death the principal was to be transferred to his children, if any, otherwise to two nephews and a niece, in equal proportions, share and share alike, issue to take the parent's share, with benefit of survivorship between the nephews and niece: and, upon a question between a nephew who survived *Samuel*, and the representative of the other nephew and niece, *Arden*, Master of the Rolls, said, "On the blind words, *with benefit*

1828.

Doe dem. Lord against Price.

lands were devised to trustees in trust, to apply the rents to the maintenance of six younger children, till the youngest, *Elizabeth*, should attain twenty-one, and on her attaining twenty-one, then to the six, and the survivors and survivor of them, their heirs and assigns for ever, as tenants in common, and one of the six survived the testator, but died before *Elizabeth* attained twenty-one, the Court of Common Pleas certified to the Court of Chancery that he had a share, which at his death descended upon his heir; so that the Court of Common Pleas must have considered the words "the survivors and survivor" as applying to the period of the testator's death, not to the period of *Elizabeth's* attaining twenty-one. In *Rose* v. *Hill* (*a*), which was cited in argument, in *Doe* v. *Sparrow* (*b*) and in *Clayton* v. *Lowe* (*c*), words of survivorship were referred to the period of the testator's death, not to any ulterior time in the case of devises of land; and in Lord *Bindon* v. Lord *Suffolk* (*d*), and other cases in Chancery, they have been referred to the same period upon personal bequests.

In many indeed, if not in most of these cases, this has been a necessary construction, because the devises or gifts were not to a class, but to individuals: they were to take as tenants in common; there was no specific definite period but the testator's death to which the words of survivorship could apply; and it would have been inconsistent with the tenancy in common to have applied them to any later period; but that objection does not apply to the cases of *Wilson* v. *Bayley*, *Perry* v. *Woods*, *Maberly* v. *Strode*, and *Edwards* v. *Symons*, because in the first three, there was the alternative between the testator's death and the death of the tenant

(*a*) *Burr.* 1881.
(*b*) 13 *East*, 359.
(*c*) 5 *B. & A.* 636.
(*d*) 1 *P. Wms.* 96.

for

1828.

Doe dem. Lord against Fraser.

for life; and in the last, between the testator's death and the youngest child *Elizabeth*'s attaining twenty-one. And the testator's death is in this case so much the more rational period, so much the more likely to have been intended, and falling in, as it does, with the rule of law for vesting estates as soon as they may, instead of leaving them contingent, that we are of opinion that the estate here vested in remainder immediately upon the testator's death, in the then children of *Jennings* and *Warren*; and that upon the deaths of those who died after the testator, and before the testator's widow, their sevenths descended upon their respective heirs at law; and, consequently, that the lessor of the plaintiff is entitled to recover one-seventh. A verdict, therefore, must be entered accordingly, and the postea delivered to the plaintiff.

I have not entered into a detailed examination of the cases cited for the defendant, because no one of them is in point: none of them bear closer upon this case than *Wilson* v. *Bayley*, and the other cases I have stated; and, as far as they differ from these cases, we think these cases preferable.

Postea to the plaintiff.

[redacted]

1828.

The KING *against* The Inhabitants of BROMYARD.

the rate with 10*s.* costs, to be paid by the respondents, subject to the opinion of this Court on the following case: —

The particular grounds of appeal stated and specified in the notice of the appellant were only, "that he was over-rated in the said rate or assessment in respect of the yearly value of the lands and tenements for and in respect of the occupation of which he was assessed or charged in the said rate or assessment; and also that no part, or a very small part only, of the lands and tenements in respect of which he was assessed and rated in the said rate or assessment, was situate in the said town; and also that he did occupy no rateable property, or rateable property to a much less amount than that for which he was so rated and assessed in the said rate." On the rate in question being produced, it appeared to be intitled "An assessment made upon the several occupiers of lands, tithes, and hereditaments in the town of *Bromyard*, in the county of *Hereford*, of 1*s.* in the pound for the necessary use of the poor and other purposes relative to the acts of parliament, granted at a committee meeting the 9th day of *November* 1827, by *T. B.* clerk, and *C. S. L.* dean of *St. Asaph*, two of his Majesty's justices of the peace in and for the said county of *Hereford*." The property in respect of which the appellant and several others were rated was specified, but the property in respect of which the majority were rated was not stated, the names of the persons and the sums only being inserted. It was contended, that the court of quarter sessions ought not to examine or enquire into this objection to the rate, or to take notice of it, as it was not specifically pointed out by the notice of appeal. The sessions, however, determined otherwise,

1828.

The KING *against* The Inhabitants of BROMYARD.

wise, and on this objection quashed the rate, subject to the opinion of this court.

Justice in support of the order of sessions. The rate in this case was illegal, and void on the face of it, because it did not specify the property in respect of which the assessment on each individual was made, *Rex* v. *Air and Calder Navigation* (*a*). The sessions, therefore, were bound upon inspection of the rate itself to quash it. It is true that the statute 41 *G.* 3. *c.* 23. *s.* 4. prohibits the justices from examining or enquiring into any other causes of appeal than those mentioned in the notice. But the examination and enquiry there mentioned import an investigation of the cause of appeal by extrinsic evidence. Here the defect in the rate appeared upon inspection, and no examination or enquiry by extrinsic evidence was necessary to enable the justices to quash the rate.

Campbell, contrà, was stopped by the Court.

BAYLEY J. There can be no doubt that it ought to appear on the face of the rate in respect of what property the assessment is made upon each individual charged in the rate; and if the omission of that statement had been pointed out by the notice as one of the grounds of appeal, it would have been a sufficient ground for quashing the rate. In many instances the specification of the property in respect of which the assessment is made will give no further information to the parties to be affected by the rate than the fact of their having

(*a*) 2 *B.* & *C.* 713.

been

1828.

The KING *against* The Inhabitants of BROMYARD.

been rated at a specific sum. But still the party rated has a right to know in respect of what property he is rated, in order that if he is over-rated in respect of that property he may appeal. If, however, he be satisfied with the amount of the sum for which he is rated, he will not appeal, because it will not be his interest to have the rate corrected. By the statute 41 *G.* 3. *c.* 23. the legislature intended to limit the expense of appeals, and to lessen the labour of the justices at sessions. By the fourth section it is enacted, "that all notices of appeal against any rate shall be in writing, &c., and that the particular causes or grounds of appeal shall be stated and specified in such notice; and upon the hearing of any appeal from or against any such rate, the court of general or quarter sessions to which such appeal shall be made shall not examine or enquire into any other cause or ground of appeal than such as are or is stated and specified in the notice of appeal." Now, suppose there were no notice of appeal whatever, could the sessions quash the rate upon the ground that it was bad for a defect apparent on the face of it? Clearly not. Or could the sessions quash the rate for such a defect, if a general notice of appeal were given, without specifying any cause? They certainly could not, because the statute prohibits their enquiring into any causes of appeal except those mentioned in the notice. For the same reason they cannot, in a case where certain causes of appeal are specified in the notice, go into others not specified. It is said that the words "examine and enquire" are applicable to those cases only where extrinsic evidence is required to shew the defect in the rate, and not to cases where the defect

1828.

The KING against The Inhabitants of BROMYARD.

appears on the face of it. But we should not do justice to the intention of the legislature if we entered into so very critical an examination of the language of the act. When the language of a deed is made the subject-matter of discussion, in order thereby to ascertain its legal effect, it may be said to be the subject of examination and enquiry. It has been said that this rate is illegal and void on the face of it, because the property in respect of which the assessment is made is not specified. I am of opinion that it is not illegal and void on that ground, unless that be pointed out as a specific cause of appeal in the notice. That is one ground of objection which will render the rate liable to be quashed. But if no objection be made on that ground it will be good. In *Rex* v. *Air and Calder Navigation* (*a*) the objection was specifically pointed out in the notice of appeal.

HOLROYD J. It seems to me that the sessions had no jurisdiction to consider this objection, unless it was specified in the notice as a ground of appeal. They had no jurisdiction whatever over the rate, unless the notice required by the statute was given, except in the case

1828.

The KING *against* The Inhabitants of BROMYARD.

import warrants, and the object of the legislature seems to require. The fourth section requires that all notices of appeal shall be given in a particular manner, and that the particular causes or grounds of appeal shall be specified in the notice. So far that section is directory, but in what follows, it is not merely directory but prohibitory. It goes on, "and upon the hearing of any appeal from or against such rate, the court of quarter sessions *shall not examine or enquire* into any other cause or ground of appeal than such as are stated and specified in the notice of appeal." Construing this clause according to the natural import of the words used, I think that it means, that the sessions shall not enter into any other causes of appeal than those specified in the notice; but assuming the meaning of the words "examine or enquire" to be doubtful, I think we ought to put upon the clause that construction which will have the effect of preventing "the quashing of rates," the inconvenience mentioned in the recital, which it was the object of the statute to remedy; and construing the clause with reference to that object, I think that the sessions had no power to enter into any other causes of appeal than those stated in the notice; and that being so, I think that we must hold that the sessions had no jurisdiction to quash the rate upon the ground that the property in respect of which the assessment was made was not described, because that was not specified in the notice as a cause of appeal.

LITTLEDALE J. By the statute of the 43 *Eliz. c.* 2., the rate was to be made upon every inhabitant in respect of certain descriptions of property. The property in respect of which individuals are assessed ought, therefore,

1828.

The King against The Inhabitants of Bromyard.

to be specified in the rate for two purposes: first, that the parties rated may see whether they have the property, and that it is the subject of the rate; secondly, that other persons may see whether the rate be equally assessed. If the property be not specified, the rate is defective and informal, and that informality is a ground of appeal, provided it be made the subject of appeal by giving the required notice. The 41 *G.* 3. *c.* 23. *s.* 4. says, that the sessions shall not examine or enquire into any other cause of appeal than such as are specified in the notice. It is true that in this case there was a defect on the face of the rate itself, which would, therefore, appear on inspection. But if neither the person whose property is omitted, nor others who have an interest that the rate should be equal, make the omission of such property a ground of complaint, the justices have no jurisdiction to quash the rate on that account. I think that the words "examine or enquire" apply to an examination by inspection as well as by extrinsic evidence. The word *examine* is frequently used in the same sense as the word *inspect*. Thus the statute 27 *Eliz. c.* 5., which gives the writ of error from the Court of King's Bench to the Court of Exchequer

[redacted]

treasurer, the word *examine* is used in the same sense. I therefore think that the justices at sessions could not properly take notice of this objection to the rule.

Order of sessions quashed.

1828.

The KING *against* The Inhabitants of BROMYARD.

The KING *against* The Inhabitants of LOUTH.

An indenture, by which an apprentice was bound for seven years, to serve *A. B.* for the first four years, and his own father for the last three, to learn two different trades, is a valid indenture, and requires only one stamp.

UPON appeal against an order of two justices, whereby *B. Furnish*, his wife and children, were removed from the parish of *Louth*, in the parts of *Lindsey* in the county of *Lincoln*, to the township of *Baildon*, in the parish of *Ottley* in the West Riding of the county of *York*, the sessions discharged the order, subject to the opinion of this Court on the following case: —

The pauper, *B. Furnish*, being legally settled in the township of *Baildon*, in the county of *York*, was in the year 1780 bound apprentice by indenture, upon which there is only one 5*s*. stamp (and of which the following is a copy), duly executed by all parties, to his father, *Thomas Furnish*, a wool-comber, and to *J. Grozer* a weaver, both then residing in the township of *Leeds*, in the county of *York*, but not copartners.

" This indenture, made the 1st day of *January* 1780, between *John Grozer* of the parish of *Leeds*, in the county of *York*, weaver; and *T. Furnish*, wool-comber, of the one part, and *B. Furnish*, of the parish aforesaid, of the other part; witnesseth, that *B. Furnish* hath of his own free will and with the consent of his parents put and bound himself apprentice to and with the said *J. Grozer* and *T. Furnish*, and with them after the

1828.

The KING *against* The Inhabitants of LOUTH.

manner of an apprentice to dwell, remain, and serve from the date hereof, for, during, and until the term of seven years thence next following be fully completed and ended." There then followed the usual covenants by the apprentice, well and faithfully to serve his masters; and also covenants by *Grozer*, that he and *T. Furnish* should teach the apprentice the trade of stuff-weaving and wool-combing, and that *Grozer* should provide the apprentice meat, drink, washing, and lodging, for the first four years, and work during that period; and that the apprentice should serve the latter three years with *T. Furnish*; and that *Grozer* should be absolutely free from the apprentice at the end of four years from the date of the indenture. The pauper served and resided under such indenture at *Leeds* for four years and three months, and then removed to *Louth*.

Hildyard and *Whitehurst* in support of the order of sessions. This is a valid indenture, although it be unusual in its form. The object of the contract of apprenticeship being, that the apprentice shall be taught, and be subject to a proper control for a certain period, may be attained as well by binding him to two masters in succession, to learn two trades of them, as by binding him to one master to learn one trade. There is no objection on principle to such an indenture; nor is it void because it has but one stamp. *Rex* v. *Reeks* (*a*) will be relied on by the other side. There a statute directed that there should be a certain stamp on every piece of vellum on which any admission into a corporation should be engrossed; and it was held, that the admission of several

(*a*) *Ld. Raym.* 1445.

persons

1828.

The KING *against* The Inhabitants of LOUTH.

persons could not be engrossed on the same piece of vellum, unless it had as many stamps as there were admissions. But in that case the stamp-duty was imposed on the piece of vellum. Here it is imposed on the indenture, and there is but one indenture. So, where a number of persons severally bind themselves in a penalty by one bond, conditioned for the performance by each and every of them of the *same matters*, it was held, that such bond required only one stamp, *Bowen* v. *Ashley* (*a*). So, where a lease contained several distinct demises at distinct rents, it was held that it might be stamped according to the aggregate of the stamps required for the several demises, *Boase* v. *Jackson* (*b*). So an agreement by several subscribers to a common fund, *Davis* v. *Williams* (*c*) or of reference by several underwriters of a policy, *Goodson* v. *Forbes* (*d*), or an assignment of the prize-money of several seamen on board a privateer, payable out of the same fund, *Baker* v. *Jardine* (*e*), requires but one stamp.

N. R. Clarke and *Fynes Clinton* contrà. The instrument in question operates either as two distinct indentures or as an indenture and assignment, and in either case two stamps are necessary. It has all the effect of two indentures, for there are two bindings to two different masters, and each of them contracts to instruct and find the apprentice with provisions. It is clear that they are two distinct bindings; because the first master was to be "*absolutely free*" of the apprentice at the end of four years; and the second master had no control over him,

(*a*) 1 *N. R.* 274.
(*b*) 3 *B. & B.* 185.
(*c*) 13 *East*, 232.
(*d*) 6 *Taunt.* 171.
(*e*) 13 *East*, 235. n.

or

1828.

The King against The Inhabitants of Louth.

or power of requiring his services, nor was he under any liability to take him, till the end of the four years. At all events, this instrument has all the effect of an indenture, binding the apprentice to the first master, and of an assignment by him to the second. The two masters acquired by the indenture two distinct interests in the apprentice, and in that respect this case is distinguishable from the cases cited on the other side. In those cases the several parties had a community of interest.

Bayley J. It was once supposed that the effect of the statute of the 5 *Eliz. c.* 4. was to avoid all indentures by which the apprentice was bound for any period less than seven years. The effect of that statute is that certain benefits result from an apprenticeship for seven years, which do not obtain in other instances. But it has been decided that indentures binding for a shorter period are not void, but voidable only, if the parties themselves think fit to take advantage of it, and, therefore, a binding for four years has been held to confer a settlement. It seems to me that this is a valid indenture, and sufficient for the purpose of constituting an

1828.

The KING *against* The Inhabitants of LOUTH.

control for the whole seven years: it was not unreasonable, in the first instance, that he should make a bargain with two different persons that his son should be taught two different trades; that he should serve one master for four years in order to learn one trade, and the other three years to learn the other trade. The father, perhaps, may have found it difficult to get one master to take his son for seven years, and may have found one willing to take him for four, provided, in the first instance, he bound himself to take the apprentice at the end of four years, when his term with the first master was to expire. And if that was the agreement originally made between the parties, then at the expiration of the first four years the second master, who in this instance was the father of the apprentice, would not take the apprentice by assignment, but by virtue of the indenture. It seems to me that it was reasonable to make a stipulation, in the first instance, that the apprentice should be bound during the seven years to the two masters to learn two trades, and that that stipulation may be considered to be incorporated in the indenture. The whole was one transaction, and the indenture, therefore, required only one stamp. The order of sessions must, therefore, be confirmed.

HOLROYD J. I am of the same opinion. The object of the contract of apprenticeship is, that the apprentice shall be taught for a certain period. The usual practice is to bind the apprentice for seven years to one master for the purpose of being taught one trade. It will be a good contract of apprenticeship if the apprentice be bound to two masters successively to learn two different trades. And I think such an indenture having

1828.

The King against The Inhabitants of Loxth.

having only one stamp is not avoided by any provision of the stamp-act, unless it be shewn that the parties, when they adopted that particular form of indenture, thereby intended to evade the payment of duties which by law they otherwise would have been bound to pay. Unless that be shewn, I think we should construe the indenture so as not to avoid it. Now if it was bonâ fide agreed between the father and the first master, with a view that his son should have all the benefits of serving a seven years' apprenticeship, that he the father should take the son at the end of the first four years, he would take him under the indenture, and no new stamp would be necessary. The duty is imposed upon every indenture, and not with reference to the number of masters whom the apprentice is to serve, or the number of trades he is to learn. No fraud being found, I think there was but one binding and one indenture. There may have been two bindings in one sense, so far as the masters were concerned, but so far as the apprentice was concerned there was but one; he was bound by one indenture to serve one master for four and another for three years.

[redacted]

1828.

The KING *against* The Inhabitants of LOUTH.

respective trades. The statute of 5 *Eliz. c.* 4. confers certain privileges on persons who serve an apprenticeship for seven years. But it has been decided that it does not render void all other contracts of apprenticeship. Independently of the stamp-act, this indenture is therefore valid. But by that statute the legislature have required that a duty shall be paid on every indenture, not that a distinct duty shall be paid in respect of each master the apprentice is to serve, or each trade he is to learn. Here the duty required by the act has been paid on the indenture. I think that this instrument does not operate as two indentures, or as an indenture and assignment, so as to require two stamps. There was no intention to evade the payment of the stamp duties. And as this would be a good indenture at common law, and is not avoided by the statute of *Elizabeth*, and as the parties might have entered into the engagement at common law by one indenture, I cannot say that it operates as two. It has not the effect of two bindings, but relates to one transaction, the feeding and teaching of one apprentice. I think, therefore, that it operates as one binding. And if it was originally agreed between the father and the first master that the former should take the apprentice at the end of the first four years, he took the apprentice by virtue of the indenture, and not of an assignment.

Order of sessions confirmed.

1828.

The KING *against* The Justices of WORCESTERSHIRE.

In an order of justices for stopping up an unnecessary highway under the *55 G. 3. c.* 68., it must be stated that it appeared to the justices, *on view*, that the way was unnecessary; and, therefore, an order, merely stating that the "justices had, upon view, found, *or* that it appeared to them," that the way was unnecessary, is bad.

AN order of justices for stopping up a highway stated as follows: — "We, the undersigned *W. H.* and *W. V.*, two of his Majesty's justices of the peace, having upon view found, *or* it having appeared to us, that part of a certain public bridle-road and public highway, &c. (describing the road) is an useless and unnecessary public highway, do order that the said part of the said public bridle-road and public highway henceforth be stopped up." This order having been confirmed at the quarter sessions, *Coltman* obtained a rule nisi for a certiorari to remove into this court the original order, and the order of sessions confirming the same, on the ground that it did not appear on the face of the order that the justices had any jurisdiction to stop up the road in question, inasmuch as the statute *55 G. 3. c.* 68. gave the justices power to stop up unnecessary roads upon *view* only; and here it did not appear whether the

1828.

The KING *against* The Justices of WORCESTERSHIRE.

having appeared to us on view." In furtherance of the manifest intention of the justices the words "upon view" may be transposed. It is immaterial whether they precede or follow the participle. Supposing the words were transposed, "we having found," or "it having appeared to us *on view*," or suppose the words *on view* to have been repeated, there could then have been no doubt as to the meaning of the order.

BAYLEY J. It seems to me quite clear that this order cannot be supported. The 55 *G.* 3. *c.* 68. *s.* 2. enacts, "that where it shall appear on the view of any two or more justices of the peace that any public highway, bridle-way, or footway is unnecessary, it shall be lawful by order of such justices, or any two of them, to stop up such unnecessary highway," &c. The justices have no jurisdiction to stop up the highway unless they pursue the power given to them by the legislature. The act says they may on *view* take away the right of the public to pass along the highway. The justices, therefore, ought to shew on the face of the order that they have had a view, and that it had appeared to them *on view* that the highway was unnecessary. They ought either to use the words of the act of parliament, or other words of equivalent import. They have not by this order shewn that they had a view, and that upon such view they found the highway to be unnecessary. We must construe the words used by them according to their plain and natural import in the order in which they stand. So construing them, they say, "they had upon view found, or it had appeared to them, that part of the highway was unnecessary;" or, in other words, that they had done that which the legislature required, or

something

1828.

The King against The Justices of Worcestershire.

something else. That being so, I cannot say that upon the face of the order it appears that the justices had jurisdiction. The rule for a certiorari must, therefore, be made absolute.

LITTLEDALE J. The justices might perhaps stop up an unnecessary highway under the 13 *G.* 3. *c.* 78. *s.* 22. without having had a view. For there the words are, "where it shall appear to the justices who are hereby authorized to view or enquire into the same;" but the 55 *G.* 3. *c.* 68. *s.* 2. makes it necessary that it should appear upon view to the justices. Here the order does not shew that the justices had a view.

Rule absolute.

Sir *James Scarlett* and *Coltman* were to have argued in support of the rule.

[redacted]

1828.

CUBITT *against* PORTER.

The common user of a wall separating adjoining lands belonging to different owners, is primâ facie evidence that the wall, and the land on which it stands, belongs to the owners of those adjoining lands in equal moieties as tenants in common.

Where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, and a new wall was built of a greater height than the old one; it was held, that this was not such a total destruction of the wall as to entitle one of the two tenants in common to maintain trespass against the other.

DECLARATION stated that the defendant on, &c., at, &c., broke and entered a certain close of the plaintiff, to wit, in the city of *Norwich*, and county of the same city, and then and there pulled down and damaged a great part of a certain wall of the plaintiff, then standing and being in and upon the said close, and the materials thereof, of the plaintiff, of the value of 100*l.*, seized, and carried away, and converted, and disposed thereof to his, the defendant's, own use; and also erected and built a certain other wall, and a certain privy, and a certain other erection and building against and upon the wall of the plaintiff, and kept and continued the same other wall, &c., upon and against the wall of the plaintiff for a long space of time, and also cast divers quantities of bricks and rubbish upon the plaintiff's close, by means of which several premises the wall of the plaintiff had been and was greatly weakened and injured, &c. Plea, not guilty. At the trial before *Alexander* C. B., at the Summer assizes for the county of *Norfolk*, 1826, it appeared that the plaintiff was the occupier of a cottage and garden, as tenant to one Mr. *Doman*. They had formerly been the property of the plaintiff's father. The defendant was the owner of premises adjoining those occupied by the plaintiff, and separated therefrom by a wall, part of which the defendant, in *July* 1825, had pulled down, and erected on the site of it another wall (of a greater

1828.

Curtis against Porter.

height than the old wall), with a cottage and other buildings against it, and the present action was brought, after the new wall had been rebuilt, to try the right of property in that wall. There was evidence on both sides of various acts of user of the wall by the respective owners of the plaintiff's and defendant's premises. The Lord Chief Baron, upon this evidence, told the jury to find for the defendant, if they thought the wall was his, or if, from the common user of the wall by the respective owners of the plaintiff's and defendant's premises, they believed the plaintiff and defendant had a common property in it. The verdict returned by the foreman of the jury was, "We find this to be a party wall." The Lord Chief Baron said, That is a verdict for the defendant. After the jury had separated, the plaintiff's counsel observed, that the wall might be a party wall, and yet the plaintiff and defendant might not be tenants in common of it, or of the land on which it was built; for if each of the proprietors of the two estates contributed the site of the land on which it was built in equal moieties, or had contributed in the same proportion to the expense of building it, each of them would remain the owner of

and of the land on which it was built, still the action was maintainable, because there had been a destruction of the subject-matter of the tenancy in common by one of the two co-tenants.

Robinson and *Wallinger* now shewed cause. The jury having found this to be a party wall, in answer to the question submitted to them, whether it was the common property of the plaintiff and defendant, the verdict was properly entered for the defendant. In *Matts* v. *Hawkins* (*a*), where there had been a common user of a wall by the owners and occupiers of adjoining premises for a considerable period of time, but the wall was proved to have been built at the joint expense of the two, and the land on which it was built to have been contributed in equal moieties; it was held, that they were not, therefore, tenants in common of the wall, or of the land on which it stood. But in this case it did not appear at whose expense the wall was built, or that the land had been contributed in equal moieties. The reasonable presumption arising from the common user, therefore, was, that the wall and the land on which it stood belonged to the owners of the two estates as tenants in common, *Wiltshire* v. *Sidford* (*b*). Besides the mode in which the question

(*a*) *5 Taunt.* 20.

(*b*) WILTSHIRE *v.* SIDFORD. *Michaelmas*, 8 *G.* 4.

This was an action of trespass. The cause was tried before *Burrough* J. at the Spring assizes for the county of *Wilts*, 1827. The plaintiff was the owner of a house at *Wilton*, and the defendant the owner of an adjoining house, which he pulled down and rebuilt, and he built upon and against a wall dividing the former premises, and which the plaintiff claimed as being his sole property. There was contradictory evidence as to the former

1828.

CURTIS against PORTER.

question was submitted to the jury was not objected to at the trial, nor was any observation made upon the terms in which the verdict was found, until after the jury had separated. Secondly, assuming it to be established that the parties were tenants in common of the wall and of the land on which it stood, then this action was not maintainable, because one tenant in common cannot maintain trespass against another. There had not been a total destruction of the subject-matter of the tenancy, but a temporary removal of it, with the intention of promptly reinstating it in a more perfect state. One tenant in common can only maintain trespass against the other where there has been an entire

---

state of the plaintiff's premises, and conflicting opinions of surveyors from the existing state of the defendant's premises, as to there having been two existing walls or only one, and as to the wall having been originally the exterior wall of the plaintiff's premises before the defendant's premises had been built. The learned Judge told the jury, some of whom had had a view, that if they were satisfied that there had been originally but one wall, and that it had been jointly used by the owners of both the premises for nearly a century, the date of the defendant's building, he was of opinion, that the action was not maintainable, and he left it to the jury to say, whether it was a party-wall or not. The jury said they considered it to be a party-wall, and found a verdict for the defendant. A rule nisi for a new trial was obtained, principally upon the ground, that the verdict was

1828.

CUBITT *against* PORTER.

destruction of the thing held in common; as if the whole flight of doves be destroyed by one of two tenants in common of a dove-house; or all the deer by one of two tenants in common of a park. In this case, before the commencement of the action, the wall had been rebuilt. At the time, therefore, when the action of trespass was brought, the subject-matter of the tenancy in common was not destroyed.

Storks Serjt. and *F. Kelly* contrà. The plaintiff as well as defendant claimed the whole property in the wall. Neither of them contended that there was a tenancy in common of the wall, or of the soil on which it stood. That view of the subject was first taken by the Lord Chief Baron, and he left it to the jury to find for the defendant, if they thought from the user of the wall that the plaintiff and defendant were tenants in common. They found it to be a party wall. Now if the two proprietors of the premises had contributed jointly to the expense of building the wall, and in equal moieties the land on which it was built, there would have been the same common user, and yet they would not have been tenants in common of the wall, or of the soil on which it was built, *Matts* v. *Hawkins* (*a*). There was no evidence of any tenancy in common of the land on which the wall was built, or even of the wall itself. But, secondly, assuming that the plaintiff and defendant were tenants in common of the wall and of the land on which it stood, trespass was maintainable, because there had been a total destruction of the wall, which was the subject-matter of the tenancy in common.

(*a*) *5 Taunt.* 20.

1828.

CURITT against POATER.

Co. Litt. 200 *a*. Among several instances there stated where trespass will lie, is the following: "If two tenants in common be of land and of mete stones, pro metis et bundis, and the one take up and carry them away, the other shall have trespass." That shews trespass will lie for even a temporary removal of the mete stones, the tenant in common being wholly deprived of the use of them during such removal. In *Litt.* s. 322. it is laid down, that if two have an estate in common for term of years, and the one occupy all, and put the other out of possession and occupation, the latter may maintain ejectment. Here there was evidence of an actual expulsion. For the defendant pulled down the old wall, and thereby deprived the other of the use of it for a time. Before the new wall was built, the plaintiff was wholly deprived of the use of the wall. That was an expulsion.

BAYLEY J. I am of opinion that the rule for a new trial ought to be discharged. This was an action for pulling down the plaintiff's wall. If the wall was the exclusive property of the plaintiff, then the act done by the defendant was a sufficient ground for the action. If it was entirely the property of the defendant, then he was justified in doing what he did. There was a third view of the case, and that was the view taken of it by the Lord Chief Baron at the trial, viz. that it might be the common property of the plaintiff and defendant. The question left to the jury was, Whether from the common use of the wall they would not infer that it was common property? Now there was certainly very strong evidence of common use, and the nature of the right may be collected from the manner in which a

thing

1828.

CURTIS against PORTER.

thing has been used. The jury found that it was a party wall; they did not in terms find that it was common property; but on having the question whether it was common property put to them, they found it was a party wall. The Lord Chief Baron observed, this was a verdict for the defendant. Until the jury had separated, no observation was made upon the subject of the direction of the Judge, or upon the answer of the jury on that point. And I think it is too late, on a motion for a new trial, to suggest that the case might have been differently presented to the consideration of the jury; and that if that had been done, the verdict might have been different. The probability is against the existence of that state of things which would have justified a verdict for the plaintiff, even on that view of the case, which was not presented to the consideration of the jury. Where a wall is common property, it may happen either that a moiety of the land on which it is built may be one man's, and the other moiety another's, or the land may belong to the two persons in undivided moieties. It does not appear whether at the time when this wall was built the land belonged wholly to one individual. It might at that time have belonged entirely to one, and then he might have sold off a part; or he might have sold an undivided moiety of the wall with the land on one side, and an undivided moiety of the wall with the land on the other side. If the land on which the wall was built belonged on one side to one party, and on the other to the other party, and they between them agreed to build the wall, it would have been prudent at least to make this bargain, that so long as there was to be a wall continuing on this property, the

1828.

CURTIS against PORTER.

land on which it was built, and the wall which stood upon that land, should be taken and considered to be the common property of the two, and that the owners of the estates on each side should be tenants in common of the undivided moiety of that land and of that wall; with the power of adopting such remedies for partition as tenants in common may adopt. On the other hand, if the wall stood partly on one man's land, and partly on another's, either party would have a right to pare away the wall on his side, so as to weaken the wall on the other, and to produce a destruction of that which ought to be the common property of the two. It seems to me, the probability of the case is, that this was not a party wall according to the principle which was acted upon in the case of *Matts* v. *Hawkins* (*a*), but that it was a wall built on the common property of the two, and that the wall was the common property of both. *Matts* v. *Hawkins* naturally led to a different conclusion; for under the party-wall act, each is to contribute the land for that which is to be built on the common soil of the two. If the land is to be contributed by the parties in equal proportions, it may be a probable consequence (I do not say whether it is or not) that the wall belongs one half to

Then, the next point is, whether, assuming that the land on which this wall was built, and that the wall itself, was the common property of the two, the act done by the defendant entitled the plaintiff to maintain trespass. It has been contended that trespass is maintainable, on the ground that there was a destruction of the thing, and that if one tenant in common destroy that which is the subject of the tenancy in common, that is an actual ouster and expulsion by the one of the other, and that the party so expelled may maintain an action of trespass for what has been done in that respect. Perhaps if one had entirely destroyed the wall, that might have been a foundation for an action of trespass. But I take it, that in the case of a wall, a temporary removal, with a view to improve part of the property on one side at least, and, perhaps, on both, is not such a destruction as will justify an action of trespass. There is no authority to shew that one tenant in common can maintain an action against the other for a temporary removal of the subject-matter of the tenancy in common, the party removing it having at the same time an intention of making a prompt restitution. It was not a destruction: the object of the party was not that there should be no wall there, but that there should be a wall there again as expeditiously as a wall could be made. But then it is said the wall here is much higher than the wall was before. What is the consequence of that? One tenant in common has, upon that which is the subject-matter of the tenancy in common, laid bricks and heightened the wall. If that be done further than it ought to have been done, what is the remedy of the other party? He may remove it. That is the only remedy

he

1828.

CURTIS against PEARCE.

he can have. If there be land belonging to two as tenants in common, and one builds a wall on that land, the other cannot bring trespass, because he is excluded from the surface of that ground for a certain period of time, viz. for so long a period as that wall stands. This case falls within the principle acted upon in *Wiltshire* v. *Sidford* (*a*). The view in which it was presented to the jury by the Lord Chief Baron was the right view of it. There was evidence of a common user by both parties, which justified the presumption either that the wall was originally built, on land belonging in undivided moieties to the owners of the respective premises, and at their joint expense; or that it had been agreed between them that the wall and the land on which it stood should be considered the property of both as tenants in common, so as to insure to each a continuance of the use of the wall. For these reasons I am of opinion that this rule ought to be discharged.

HOLROYD J. I am of opinion that this rule ought to be discharged. It is incumbent on the plaintiff to establish his right of action. The declaration in this case was for pulling down the old wall and building the

common wall of both. There having been a joint use of the wall by both, each must have had the right originally, or have acquired the right in the course of time by legal means. The jury have found in effect that it was their common property. The question then arises, whether one tenant in common can maintain an action of trespass against another for such acts as were done in this case by pulling down the old wall and building the new one on its site. Taking it to be the law, that where there is a complete destruction by one tenant in common of that which he has in common with others, so that that other is wholly deprived of the use of it, an action of trespass will lie, I think the act done by the defendant in this case cannot be considered as a destruction of the wall; the removal of the old wall having been effected merely for the purpose of rebuilding another on its site as speedily as possible.

LITTLEDALE J. I am entirely of the same opinion. The plaintiff seems to have claimed the wall as his own exclusive property, and so did the defendant. There was abundant evidence to raise the question for the consideration of the jury, Whether the plaintiff and defendant were tenants in common? It is suggested, that although the learned Judge left it to the jury to find whether the wall was the property of the plaintiff or of the defendant, and also whether it was the common property of both as tenants in common, yet that the foreman of the jury when he returned the verdict did not in express terms answer the question put to them by the learned Judge, but said that the jury found it to be a party-wall; and that that finding is consistent with the fact of the wall, and the soil on which it was built, having

1828.

Curry against Porter.

having originally belonged to the plaintiff and defendant, or those under whom they claimed, in equal moieties. It appears that when that verdict was returned, the Lord Chief Baron observed that it was a verdict for the defendant. The plaintiff's counsel did not then suggest to the Lord Chief Baron the propriety of leaving to the jury the question in any other form than that in which it was left to them, or intimate any doubt as to the sufficiency of the evidence to warrant the jury in coming to the conclusion to which they did come. That being so, a new trial cannot now be granted on that ground. But even assuming the parties to have been tenants in common of this wall, then it is said that trespass will lie in this case by one tenant in common against the other, because there was in this case a destruction of the subject-matter of the tenancy in common. In *Com. Dig. Estates*, (K), 8. there are various cases as to the remedy which one tenant in common has against another. It appears that with regard to actions in respect to matters not chattels, in some cases an ejectment will lie, if one actually oust his companion of the possession, and trespass will lie where there has been a complete and total destruction

case. There are other cases where the only remedy is to retake the property. As if one take a chattel real or personal entire, the other may retake it when he has an opportunity; but he has no remedy by action. If, again, there be two tenants in common of a house or mill, and it fall into decay, the one is willing to repair, and the other will not, he that is willing shall have a writ de reparatione facienda. It has been said that trespass will lie in this case by one tenant in common against the other, because there has been an expulsion amounting to an actual ouster. Now, if there has been an actual ouster by one tenant in common, ejectment will lie at the suit of the other. But I am not aware that trespass will lie, for in trespass the breaking and entering is the gist of the action; expulsion or ouster is a mere aggravation of the trespass. If the original entry therefore be lawful, trespass will not lie. In *Taylor* v. *Cole* (*a*) the first count was for breaking and entering the plaintiff's house, and expelling him. As to the breaking and entering, the defendant justified as sheriff of *Middlesex* under a fieri facias. Upon general demurrer it was held that the plea, which only justified the breaking and entering by shewing a good cause for it, was a full answer, because the breaking and entering were the gist of the action, and the expulsion was only matter of aggravation; and that if the plaintiff had wished to take advantage of the expulsion, which was merely matter of aggravation, he ought to have shewn the special matter in a new assignment, in order to make the party a trespasser ab initio. Then, if the expulsion be mere aggravation, trespass will not lie for it, because

(*a*) 3 *T. R.* 292.

the

1828.

Curtis against Fosters.

the original entry is lawful. The original entry being the gist of the action in trespass, and the expulsion mere aggravation, I doubt much whether trespass can be maintained even for an expulsion. Here the defendant pulled down one wall, and built another on its site. If two persons be tenants in common of land on which there is a wall, and one refuses to repair, and the other pulls down the wall, and sells the materials, and builds a better wall, it may be said that there has been a total destruction of the original wall, more especially if he sold the materials. Still if he did that for the purpose of getting other materials to make the new wall better than the old one was, and he builds the new one, though there was a destruction of that which was originally the subject-matter of the tenancy in common, an action of trespass will not be maintainable. Such an act is more properly the subject-matter of an action upon the case, because it is in the nature of a partial injury, and not of a total destruction of the subject-matter of the tenancy in common. If tenant for life or tenant for years pull down any wall or other building, it is the subject of an action of waste at the suit of the reversioner. It is expressly laid down in *Com. Dig.*

the two. Upon the whole, I am of opinion that trespass is not maintainable. The rule for a new trial must therefore be discharged.

Rule discharged.

The KING *against* The Inhabitants of LAWFORD.

A pauper, while he was under age, quitted his parent, and went to sea, serving sometimes in a king's ship, at other times in trading vessels, and remained in such service, and so separated from his father's family when he attained the age of twenty-one years: Held, that he was then emancipated, and that his settlement did not afterwards shift with that of his father.

UPON appeal against an order of two justices, whereby *Hannah Nunn*, widow, and her three children were removed from the parish of *Lawford*, in the county of *Essex*, to the parish of *Saint Anne, Limehouse*, in the county of *Middlesex*, the sessions quashed the order, subject to the opinion of this Court on the following case: —

John Nunn, the son of *John* and *Martha Nunn*, the late husband of the pauper *Hannah Nunn*, was born at *Wivenhoe*. *John Nunn*, deceased, was married to the pauper *Hannah Nunn*, he being about twenty-five years of age, and having acquired no settlement in his own right. In 1802, he then being about fifteen years of age, quitted his parents and went to sea, where he continued till the period of his marriage, sometimes serving on board a King's cutter (the *Argus*), and at other times on board different trading vessels, gaining his own living. Up to the age of eighteen his parents resided at *Manningtree*, and whilst there, the vessel on board of which their son was serving being stationed on the river near that town or its neighbourhood, the mother washed for him, and occasional visits were paid by the son to the parents, sometimes of a few days' continuance. During the period from 1805 to 1810,

1828.

The King against The Inhabitants of Lawford.

1810, the parents having quitted *Manningtree*, removed to *St. Anne's, Limehouse*, and resided on a tenement of the value of twelve guineas a year; and twice during those five years the son visited them there, and stayed eight or ten days at a time, returning to his ship after each visit. The distance prevented the mother from continuing to wash for the son whilst she and her husband were resident at *St. Anne's, Limehouse*, but she occasionally sent him small sums for pocket-money. The son attained the age of twenty-one whilst his parents were residing at *St. Anne's, Limehouse*. In 1810 the parents quitted that parish, and took a tenement of 24*l.* a year at *Gravesend*, on which they resided when the son married, having been in the occupation of it upwards of a year before such marriage.

Knox in support of the order of sessions. It is perhaps too late, since the recent decision in the *King* v. *Lytchet Matraverse* (*a*), to contend, that emancipation, which is not completed but by the child's not returning to his father's house under twenty-one, is to be dated from the original separation within the age of minority, and not from his attaining his majority. But that decision is to be confined to the point then in discussion

1828.

The KING *against* The Inhabitants of LAWFORD.

is, that a child follows the settlement of the father until he has acquired one of his own; the exception that he ceases to do so, where, by marriage at any period, or any other circumstances after he arrives at full age, he is placed in a condition wholly inconsistent with his being a member of his father's family. The mere fact of coming of age has never been deemed one of those circumstances. Lord *Kenyon*, in *Rex* v. *Witton cum Twambrookes* (*a*), directly denied that such a conclusion was to be drawn from the expression used by him in *Rex* v. *Roach* (*b*). Whether a child is to be considered a member of his father's family depends upon the continuance of any degree of parental control, and not upon the single fact either of actual domicile or of age. In *Rex* v. *Hardwicke* (*c*), which was the case of a soldier in the militia, and in *Rex* v. *Cowhoneyborne* (*d*), the facts were such as raised the inference of an absolute abandonment of the parental control. There is a distinction between a separation *continuing* after twenty-one and *commencing* after twenty-one. It is conceded that if an adult sever himself from his father's family, emancipation takes place; but it has not yet been ruled that the merely continuing absent from it until of full age, under circumstances that do not exclude all parental control, emancipates. In *Rex* v. *Lytchet Matraverse* (*e*), and in *Rex* v. *Huggatt* (*f*), the child was bound for a term; in one case as a servant, and in the other as an apprentice; and it was held, that the parental control still continued, as a certain degree of it was compatible with the control of the master. In *Rex* v. *Uck-*

(*a*) 3 *T. R.* 355.
(*b*) 6 *T. R.* 247.
(*c*) 5 *B. & A.* 176.
(*d*) 10 *East*, 88.
(*e*) 7 *B. & C.* 226.
(*f*) 2 *B. & A.* 582.

1828.

The Rex against The Inhabitants of Lawrean.

field (*a*), though the child had been away from the father's house nearly twenty years, and until she passed her majority, it was holden upon this principle that she was not emancipated. In this case the pauper's husband was constantly in the same condition from his first separation from his parents at the age of fifteen, serving as a mariner in different vessels until his marriage at the age of twenty-four. Nothing had occurred to destroy the degree of parental control, which, upon the authority of the cases, subsisted contemporaneously with the control of his various masters. At the time of his marriage his father was settled in *Gravesend*, which, unless he was emancipated by coming of age, would consequently be the pauper's settlement.

Jessopp (and *Mirehouse* was with him) contrà. The cases of *Rex* v. *Walpole St. Peter's* (*b*), *Rex* v. *Stanwix* (*c*), and *Rex* v. *Hardwick* (*d*), fully establish that a child who has separated himself from his father's family during his minority, and continues so separated after he has attained twenty-one years, ceases after he becomes of age to be part of the father's family, and is emancipated; and that doctrine was recognized by *Bayley* J. in *Rex* v.

1828.

The KING *against* The Inhabitants of LAWFORD.

The position laid down by *Lawrence* J. in *Rex* v. *Roach* is, that if a child leaves his father's family under twenty-one, and returns while he is under age, he continues to be part of that family, and his settlement will shift with that of his father. But if the child, when he attains twenty-one, is absent from the father's family, the father thereby loses all control over him, he becomes emancipated, and his settlement will not shift with that of the father, but will continue to be in that parish where the father was settled when the child attained twenty-one. *Lawrence* J. there says, " In the case of the soldier, the son was enlisted when he was under age, and if he had returned home before he was twenty-one, he would have been considered part of his father's family; or if he had quitted the army before twenty-one without returning home, the father might have reclaimed him by suing out a habeas corpus: but it appears from the case that he had attained the age of twenty-one before he left the army; therefore during the time that he continued a soldier, his father lost all control over him, he being of age; and the subsequent settlement gained by the father was not communicated to him." He then applies the reasoning in that case to the one before the Court, and afterwards says, " If, after such a service as this, the daughter had returned to her father before she was of age, she would have continued as part of her father's family; but not returning till after, she can no longer be considered as part of his family." The same point was decided in *Rex* v. *Cowhoneyborne.* There a widower having a daughter, placed her at eleven years of age with an uncle, by whom she was wholly maintained after that time, and with whom she continued to reside after she came of age, doing service

1828.

The King against The Inhabitants of Lawford.

for him, but without any contract of hiring to give her a settlement of her own, the father in the mean time having gone out to service. It was held, that on her coming of age she was emancipated. There, at the time when she attained twenty-one, she continued absent from her father's family. In *Rex* v. *Hardwick* the same doctrine was laid down. The only distinction between that and the former cases was, that the original separation of the pauper from his father's family was not voluntary. While he was under age he was drawn for the militia, and served in it until he was twenty-three years of age. The principle deducible from that case, however, is, that he was not part of his father's family while he continued subject to a control paramount to that of his father; and having while under age contracted a relation inconsistent with the parental control, which relation continued until after he attained twenty-one, the authority of the father thereby wholly ceased, and he could no longer insist on the child's returning to his family. The latter was, therefore, emancipated. Now here at the time when the pauper attained twenty-one the settlement of his father was in *Limehouse*. He was then in service, where he voluntarily continued after twenty-[illegible] he then became emancipated, and his settlement [illegible] The order of sessions must,

1828.

ATKINSON and Others, Assignees of SLEDDON, *against* BELL and Others.

A. having a patent for certain spinning machinery, received an order from *B.* to have some spinning frames made for him. *A.* employed *C.* to make the machines for *B.*, and informed the latter that he had so done. After the machines had been completed, *A.* ordered them to be altered. They were afterwards completed according to this new order, and packed up in boxes for *B.*, and *C.* informed *B.* that they were ready, but he refused to accept them: Held, that *C.* could not recover the price from *B.* in an action for goods bargained and sold, or for work and labour, and materials.

ASSUMPSIT for goods sold and delivered, goods bargained and sold, work and labour, and materials found and provided. At the trial before *Hullock* B. at the Summer assizes for *Lancaster* 1827, it appeared that the defendants were linen and thread manufacturers at *Whitehaven*, in *Cumberland*. The bankrupt *Sleddon* before his bankruptcy was a machine-maker residing at *Preston*, in *Lancashire*. One *Kay*, of *Preston*, obtained a patent for a new mode of spinning flax, and the defendants being desirous of trying the effect of it, on the 12th *November* 1825 by letter ordered him to *procure to be made for them as soon as possible* a preparing frame and two spinning frames, in the manner he most approved of. In *January* 1826 *Kay* ordered two spinning frames and a roving frame to be made by *Sleddon* for the defendants, and informed them that he had so done. These machines were formed on *Kay*'s first plan, and completed at the end of *March*, and after they had been so completed they lay in *Sleddon*'s premises a month, while two other machines of these defendants, intended to be used in the same mills, were altered by *Sleddon*, under *Kay*'s superintendence; and when those had been completed to his mind, he ordered the machines in question to be altered in the same manner. They were altered accordingly, packed in boxes by *Kay*'s directions, and remained on *Sleddon*'s premises. On

1828.

ATKINSON against BELL.

the 23d of *June* 1826 *Sleddon* wrote to the defendants, and informed them that the two frames had been ready for the last three weeks, and begged to know by what conveyance they were to be sent. On the 8th of *August* a commission of bankrupt issued against *Sleddon*, under which he was duly declared a bankrupt. The assignees afterwards required the defendants to take the frames, but they refused to do so. It was objected on the part of the defendants, that the action was not maintainable for goods bargained and sold, because the property in the frames had never vested in the defendants. The learned Judge was of opinion that the action was not maintainable, and he directed a nonsuit to be entered, with liberty to the plaintiffs to move to enter a verdict for the price of the machines. A rule nisi having been obtained for that purpose,

Brougham and *Parke* now shewed cause. The plaintiff is not entitled to recover on the count for goods bargained and sold, because that form of action is not maintainable, unless there be a contract for specific goods, and unless every thing has been done so as to vest the property in those goods in the purchaser, and

[redacted]

1828.

ATKINSON against BELL.

machines to be made for them in a particular mode; and the only remedy for the breach of such a contract is a special action on the case for not accepting. That the property in these machines did not pass to the defendants is clear; for in case of a destruction by fire, the loss could not have fallen on them, but it must have fallen on the bankrupt. If the bankrupt had delivered them to another person, the defendants could not have maintained trover for them. They could only have brought an action against the bankrupt for breach of contract, in not making machines according to order. They remained the property of the maker, who might have performed his contract by delivering any other similar machines. Suppose an execution to have issued against the defendants, could these machines have been seized by the sheriff as their goods? They continued the goods of the bankrupt, although he might be liable to an action for breach of the contract. There was no proof of any selection of these goods by the defendants. *Mucklow* v. *Mangles* (*a*) is an authority to shew that no property in a chattel bargained for vests in the person who orders it until it be finished and delivered, even though the price be paid. And according to the opinion expressed by *Littledale* J. in *Simmons* v. *Swift* (*b*), goods bargained and sold will not lie merely because the property passes. The mere bargain will not suffice unless the price be ascertained.

Secondly, the plaintiffs cannot recover on the count for work and labour; for that count is applicable to those cases only in which the work is done on account of the

(*a*) 1 *Taunt.* 318. (*b*) 5 *B.* & *C.* 857.

1828.

ATKINSON against BELL.

defendants. Here it was done upon the plaintiff's own account, in working up his own materials into machines, which, when completed and accepted, and not until then, could be the property of the defendants. The case of *Towers* v. *Osborne* (*a*) is of very doubtful authority, and was said to be an extreme case by Lord *Tenterden* C. J. in *Garbutt* v. *Watson* (*b*).

Cross Serjt. and *Tomlinson* contrà. There was a specific appropriation of these machines to the defendants after they were finished. *Kay* was the agent of the defendants; and their letter of the 12th of *November* 1825 gave him the most ample powers to act as he thought best for their interest, and therefore he had sufficient authority to appropriate the machines to them if he thought proper. After the machines were completed, they were, by *Kay*'s order, altered according to the latest improvement, and to correspond with other machines of these defendants altered by *Sleddon*, under *Kay*'s superintendence, and intended to be used in the same mill. That was an acceptance of these specific machines by the defendants through *Kay*. It therefore operated as a purchase of them. This case falls within

He could not sell them without the permission of *Kay*. They could not have been seized under an execution against the goods of *Sleddon*, because the sheriff could not make any title to them without *Kay*'s consent. In *Rohde* v. *Thwaites* (*a*) an appropriation of goods by the seller, assented to by the buyer, was held to vest the property in the latter. Here *Sleddon*, by *Kay*'s permission, appropriated the goods to the defendants, and they by their agent *Kay* assented to that appropriation.

Secondly, the plaintiffs are entitled to recover on the count for work and labour. For here the machines, but for the orders given by the defendants, would never have been in existence. The property in the thing ordered vests, when it is completed, by relation in the orderer, and the person who made it may then sue for work and labour. In *Towers* v. *Osborne* (*b*), the action appears to have been for the value or price of a bespoken chariot, and not a mere action for damages for not accepting; and in *Garbutt* v. *Watson* (*c*), the form of the remedy in *Towers* v. *Osborne* was not questioned. They also cited *Dunmow* v. *Taylor* (*d*).

BAYLEY J. I think the rule for entering a verdict for the plaintiff ought to be discharged. If the declaration had contained a count for not accepting the machines, the plaintiffs might have been entitled to recover; and I think now that, upon payment of costs, they should be allowed to set aside the nonsuit, and add other counts to the declaration, and have a new trial.

(*a*) 6 *B.* & *C.* 388.
(*b*) 1 *Str.* 506.
(*c*) 5 *B.* & *A.* 613.
(*d*) *Peake, N. P.* 41.

But

1828.

ATKINSON against BELL.

But I cannot say that the property passed to the defendants, so as to enable the plaintiffs to recover on the counts for goods bargained and sold, or for work and labour. It is said, that there was an appropriation of these specific machines by the maker, and that the property thereby vested in the defendants. I think it did not pass. Where goods are ordered to be made, while they are in progress the materials belong to the maker. The property does not vest in the party who gives the order until the thing ordered is completed. And although while the goods are in progress the maker may intend them for the person ordering, still he may afterwards deliver them to another, and thereby vest the property in that other. Although the maker may thereby render himself liable to an action for so doing, still a good title is given to the party to whom they are delivered. It is true that *Kay* saw these things while they were in progress, and knew that the bankrupt intended them for the defendants; yet they might afterwards have been delivered to a third person. This case is not affected by the argument that these are patent articles, because they might have been delivered to a third person with *Kay*'s assent. The case

1828.

ATKINSON *against* BELL.

there the ship-builder had signed the certificate to enable the purchaser to have the ship registered in his name; the legal effect of which was held to be to vest the general property in the purchaser. If in this case an execution had issued against *Sleddon*, the sheriff might have seized the machines. They were *Sleddon*'s goods, although they were intended for the defendants, and he had written to tell them so. If they had expressed their assent, then this case would have been within *Rohde* v. *Thwaites* (*a*), and there would have been a complete appropriation vesting the property in the defendants. But there was not any such assent to the appropriation made by the bankrupt, and therefore no action for goods bargained and sold was maintainable. Then as to the counts for work and labour, if you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labour and your materials to any other person. Having bestowed his labour at your request on your materials, he may maintain an action against you for work and labour. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labour and materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and the employer accepted it, the party employed may maintain an action for goods sold and delivered; or if the employer refuses to accept, a special action on the case for such refusal. But he cannot

(*a*) 6 *B.* & *C.* 388.

maintain

1828.

ATKINSON against BELL.

maintain an action for work and labour, because his labour was bestowed on his own materials, and for himself, and not for the person who employed him. I think, that in this case the plaintiff cannot recover on the count for work and labour.

HOLROYD J. I think that on the facts given in evidence a verdict might have been sustained on a count for not accepting the machines. I have entertained great doubt during the argument, whether a verdict might not be sustained on the count for work and labour and materials found. I think it will not lie for goods bargained and sold, because there was no specific appropriation of the machines assented to by the purchaser, and the property in the goods, therefore, remained in the maker. Then as to work and labour, the work was done, and the labour bestowed on the materials of the maker in manufacturing an article which never became the property of the defendants. I am of opinion, therefore, that the work was done for the bankrupt, and not for the defendants.

LITTLEDALE J. I am of the same opinion. Goo[illegible]ned and sold will not lie unless there be a s[illegible] sale in this case, unless t[illegible] the art[illegible]

1828.

ATKINSON *against* BELL.

the defendants could not have maintained trover against the party to whom they were delivered. In the case of an execution or a bankruptcy, these machines must have been treated as the goods of the maker. As to the count for work and labour and materials, the labour was bestowed, and the materials were found, for the purpose of ultimately effecting a sale, and if that purpose was never completed, the contract was not executed, and then work and labour will not lie. The work and labour and the materials were for the benefit of the machine-maker, and not for the defendants.

Rule absolute, on payment of costs.

JOSEPH PRATT, Administrator of ANN PRATT, *against* SWAINE.

To a declaration in trover by an administrator, alleging the grant of letters of administration to the plaintiff, and that the defendant knowing the goods to have been the property of the intestate in his lifetime, and of the plaintiff as administrator since his death, *afterwards*, and after the death of the intestate, to wit, on, &c., converted the same goods, a plea of not guilty of the premises within six years is bad upon special demurrer.

DECLARATION stated that *Ann Pratt*, in her lifetime, to wit, on, &c., at, &c., was lawfully possessed of divers goods and chattels (describing them) as of her own property, and being so possessed thereof, she afterwards, to wit, on, &c., at, &c., died so possessed, after whose death, to wit, on the 20th of *October* 1820, the said goods and chattels came to the possession of the defendant by finding, and afterwards and after the death of *Ann Pratt*, to wit, on the 4th of *May* 1822, administration of all and singular the goods and chattels of the said *Ann Pratt* was granted to the plaintiff; yet the defendant, well knowing the said goods and chattels to be the property of the said *Ann Pratt* in her lifetime, and at the time of her death, and to belong to the plaintiff as administrator as aforesaid after the death of *Ann Pratt*, but, contriving to

1828.

PRATT *against* SWAINE.

to defraud and injure the plaintiff as administrator as aforesaid, had not delivered to him the said goods and chattels, although requested so to do, and the defendant *afterwards and after the death of Ann Pratt*, to wit, on the 1st of *January* 1823, converted and disposed of the same to his, the defendant's, own use. Plea, that the defendant was not guilty of the premises in the declaration mentioned, or of any or either of them, at any time within six years next before the exhibiting of the plaintiff's bill, in manner and form as the plaintiff had complained against him. Demurrer, assigning for cause that the plea was argumentative and uncertain, and did not explicitly shew that the action was not commenced in due time, according to the statute of limitations; for although the defendant might not have been guilty of the premises mentioned in the declaration within six years next before the exhibiting the said bill, the said causes of action might have accrued to the plaintiff as administrator as aforesaid within that period.

Chitty in support of the demurrer. *Dyster* v. *Batty* (*a*) shews that to a declaration in an action on the case a plea of not guilty of the grievances within six years is bad on special demurrer; and *Murray* v. *The East India Company* (*b*) is an authority to shew that in an action by an administrator upon a bill of exchange payable to the testator, but accepted after his death, the statute of limitations begins to run from the time of granting the letters of administration, and not from the time when the bill became due, there being no cause of action until there is a party capable of suing. That being so, no cause of

(*a*) 3 *B.* & *A.* 448. (*b*) 5 *B.* & *A.* 204.

action

action accrued to the plaintiff in this case until the letters of administration were granted to him. The defendant by his plea is bound to shew that the cause of action did not accrue within six years: he only says that he was not guilty of the premises within the six years. That may be true, and yet the cause of action may have accrued to the administrator within that period.

Coleridge contrà. The conversion is the gist of the action, and it is averred in the declaration that the conversion took place *after* the letters of administration were granted. The declaration, after averring the grant of the letters of administration to the plaintiff, states that the defendant, knowing the goods to be the property of the plaintiff as administrator, afterwards converted the same. [*Holroyd* J. The word afterwards relates to something done after the death of the testator. *Bayley* J. Suppose issue had been joined on the plea: proof that the conversion took place *before* the granting of the letters of administration would have supported the averment in the declaration. Where letters of administration have been granted, the administrator is entitled to all the rights which the intestate had at the time of his death vested in him; but no right of action accrues to the administrator until he has sued out the letters of administration. It may be perfectly true, therefore, that the defendant may not have been guilty of the premises within six years, and yet that the cause of action may have accrued to the plaintiff within that period. A defendant who wishes to avail himself of the statute of limitations is bound to shew that the cause of action did not accrue within six years: he should either claim

1828.

PRATT against SWAINE.

claim the benefit in the words of the *act of parliament*, or in words of equivalent import.]

Coleridge then craved leave to amend, which was granted on payment of costs.

See *Baily* v. *Faulkener*, 3 *B.* & *A.* 288. *Short* v. *M'Carthy*, 3 *B.* & *A.* 626. *Granger* v. *George*, 5 *B.* & *C.* 129.

BRYAN *against* WHISTLER, Clerk.

Where a rector granted to *A. B.* by parol, leave to make a vault in the parish church, and to bury a certain corpse there, and that he should have the exclusive use of the vault; and afterwards, without the leave of *A. B.*, opened the vault, and buried another person there: Held, that no action could be [illegible]

CASE for disturbing a vault. The first count of the declaration stated that the defendant was rector of the parish church of *St. Clement, Hastings*, and plaintiff being desirous of burying one *M. A. W.* in a vault in that church, on, &c. applied to the defendant, as such rector, for permission to make a vault there for that purpose, and to put up a tablet or monument near the vault to perpetuate the same; and the defendant, as such rector, in consideration of 20*l.* to be paid to him for such permission, consented and agreed that the plaintiff should have permission to make such vault and to put up such tablet, *and should have the sole and* [illegible] *use of such vault*, upon being paid 20*l.* and [illegible] Averment, that the plaintiff did [illegible] cause the body of [illegible] and

1828.

BRYAN *against* WHISTLER.

to disturb the remains of the said *M. A. W.*, afterwards, to wit, on, &c., broke into and damaged the said vault, and wrongfully, and without the leave of the plaintiff, caused the same to be opened, and interred therein the body of another person. The second count, after stating the agreement with the defendant, alleged that the plaintiff, with the knowledge and consent of the defendant, put up a tablet near the vault with a certain inscription thereon, viz. " In a vault beneath this tablet (*appropriated to the family of T. B.*) are the remains of *M. A. W.*, &c.;" and then concluded as in the first count. Third count alleged generally that the plaintiff by the consent and agreement of the defendant, given in consideration of 20*l.* to him paid, had become and was *entitled to the exclusive use of a vault in the said church*, and that the defendant wrongfully defaced and injured, and opened it. Plea, not guilty. At the trial before *Gaselee* J., at the *Sussex* Summer assizes 1827, it was proved that in the year 1819, the plaintiff applied to the defendant for leave to make a vault, as stated in the declaration; the defendant by parol granted leave, but demanded a fee of 20*l.*, which sum was paid to him. The vault was made at the plaintiff's expense, and the defendant performed the burial service over the body of *M. A. W.*, who was buried in the vault, to the size of which the defendant made no objection at that time. After the funeral the defendant gave the following receipt to the plaintiff: " Received 18th *September* 1819, of *T. B.*, Esq. 20*l.* for permission to make a vault in the church of *St. Clement, Hastings*, between the south wall and aisle thereof, and to put up a tablet or monument to perpetuate the same, &c. &c., and one guinea for the service, &c." Soon after the funeral the plaintiff

1828.

BRYAN against WHISTLER.

put up a tablet with the inscription set out in the second count. This was frequently seen by the defendant, who made no objection to it. In the year 1825 the defendant, without the plaintiff's leave, caused the vault to be opened, and buried another corpse there. Upon these facts it was contended that the plaintiff had no such interest in the vault as would enable him to maintain the action, for that there was not any conveyance or other instrument vesting in him an exclusive right to the vault, and the case of *Hewlins* v. *Shippam*(*a*) was cited. The learned Judge gave the defendant leave to move to enter a nonsuit on that ground; and the jury having found a verdict for the plaintiff, *Marryat* in *Michaelmas* term obtained a rule nisi for entering a nonsuit, against which

Gurney, *Hodgson*, and *Chitty* shewed cause. The objection to this action is founded on the supposition that the plaintiff claims a freehold interest in the land. But the declaration does not disclose any such claim, and for the injury therein alleged an action is maintainable; for if a person with the assent of the incumbent erects a tomb, no one can lawfully disturb it. In the 3d *Inst.* 202. Lord *Coke* says, "Concerning the building [illegible] tombs, sepulchres, or monuments for the [illegible] common chapel, or church [illegible] and [illegible]

third resolution, establishes the same point. In *Degge's Parson's Counsellor*, 176. (*a*), it is said that the right to make tombs must be intended to be by license of the bishop or consent of the parson and churchwardens; and in *Gibson's Codex*, 542., it is said that burials within the church may be with the consent of the incumbent only. But, secondly, supposing the plaintiff is bound to rely on the agreement, the case of *Hewlins* v. *Shippam* (*b*), cited at the trial by the counsel for the defendant, is not in point. There the right claimed by the plaintiff was in derogation of the freeholder's rights; here the right claimed is quite consistent with his right, and is claimed under the very purpose for which the freehold is vested in the defendant, viz. for the burial of the dead. It is impossible to apply common-law doctrines and principles to such a case. No form of conveyance by a rector giving a perpetual right can be suggested. Where a faculty is granted, the instrument merely states that the party has obtained the assent of the incumbent or ordinary. The right must rest on the permission to bury in that vault; and when that leave was given, the vault made, and the body buried in it, the defendant could have no right to disturb it. Such a license may well be granted by parol, and when executed is irrevocable, *Winter* v. *Brockwell* (*c*), *Taylor* v. *Waters* (*d*). [*Bayley* J. It may be good as a license to bury there, and yet may not give an exclusive right.] The inscription seen and assented to by the defendant was a declaration by him that he had appropriated that vault to the plaintiff, not that he had transferred any

(*a*) 6th edit.
(*b*) 5 *B. & C.* 221.
(*c*) 8 *East*, 308.
(*d*) 7 *Taunt.* 374.

1828.

BRYAN against WHISTLER.

property to him. And even supposing that an incumbent cannot so appropriate as to bind his successor, still he must be bound during his own incumbency. No inconvenience is to be apprehended from such agreements, for if they are improperly made they may be corrected by the spiritual court, *Palmer* v. *The Bishop of Exeter* (*a*).

F. Pollock contrà. The evidence given at the trial did not support any count of the declaration. The plaintiff declared in each count upon a right *to the exclusive use* of the vault in question, and complained of an injury to that right; but he totally failed in establishing the right alleged, which could only be granted by deed. Upon this point *Hewlins* v. *Shippam* (*b*) is decisive. It is said that common-law rules cannot be applied to this case; but the action is for an injury to a common-law right; it must, therefore, be governed by those rules. The case of *Taylor* v. *Waters* (*c*) was very different; there a party who had obtained a license to enter the Opera House was turned out; here the utmost that the plaintiff could claim was a license to bury a particular person; he enjoyed that right, and the corpse

1828.

BRYAN *against* WHISTLER.

incumbency, should afterwards keep the money and recede from his undertaking. But if the question of law be with him, his defence to this action must prevail. It seems to me that the objection raised is valid. The declaration states in substance, that in consideration of a certain sum of money the defendant agreed that the plaintiff might make a vault, *and have the sole and exclusive use of it.* If that were an interest in land, the grant could not be binding under the statute of frauds, unless there were a memorandum in writing signed by the party granting. No memorandum was in this instance signed except the receipt, which is silent as to the exclusive use of the vault, and the action is brought for a violation of the plaintiff's right to the exclusive use. If it be not an interest in land it is an easement, or the grant of an incorporeal hereditament; which could only be effectually granted by deed, and no such instrument was executed. But even had a deed been executed, I think the defendant had not power to grant any privilege, except for the particular burial then about to take place. The rector has the freehold of the church for public purposes, not for his own emolument; to supply places for burial from time to time, as the necessities of his parish require, and not to grant away vaults, which, as it seems to me, cannot be done unless a faculty has been obtained. Even by means of a faculty, a pew can only be granted to the inhabitants of a parish, and it is for the most part limited to a house, a removal from which destroys the right to the pew. Now, I cannot find any good reason why the same rules should not be applicable to a vault. In *Com. Dig. Cemetery* (B), it is said, "A man may prescribe that he is tenant of an ancient messuage and

1828.

BRYAN against WEBSTER.

ought to have separate burial in such a vault within the church." This is like the prescription for a pew in *Rogers* v. *Brooks* (*a*). In the latter case the prescription implies a faculty. Why then should it not in the former? The objection to the form of action does not appear well founded, for the right claimed is not to the soil but to an easement; but for the reasons above given, I am of opinion that a nonsuit must be entered.

HOLROYD J. It seems to me, that if the action were maintainable, case would be the proper form, the claim being to an easement. But whether it be an easement or an interest in land, the action cannot be supported. The declaration states, that an application was made by the plaintiff to the defendant, for permission to make a vault and have the exclusive use of it; and that the defendant agreed that he might do so. If that could be considered as giving the exclusive use of the vault for all purposes, trespass would lie; but it must be taken as giving a special use of the vault, viz. for the purposes of burial; case, therefore, was the proper remedy, as it is for the disturbance of a pew, the right to which is granted for the special purpose of attending divine

1828.

BRYAN *against* WHISTLER.

to be an interest in land, so as to be affected by the statute of frauds. The right said to have been granted was merely a privilege to make a vault and bury there. This right is claimed as an easement, giving a sole and exclusive privilege of burial. Now, according to *Com. Dig. Cemetery* (B), that must be prescribed for as appurtenant to an ancient messuage. Prescription presumes a grant, and I have little difficulty in saying that the rector had no power to grant the privilege claimed in this case. The right acquired can be no higher than the right to a pew, which can only be claimed as appurtenant to an ancient messuage or by a faculty. In *Frances* v. *Ley* (*a*) it is said, "that neither the ordinary himself nor the churchwardens can grant license of burying to any within the church, but the parson only, *because the soil and freehold of the church is only in the parson*, and in none other;" but in *Gibson's Codex*, 542. this is denied to be the true reason, for it would apply equally to the churchyard, but that the ecclesiastical laws have appointed the incumbent as the proper judge of the fitness or unfitness of any particular person to have the privilege of being buried in the church. The incumbent, therefore, may exercise a discretion in each particular instance, where application is made for leave to bury in the church, but he has no power to grant to another the privilege of burying there whomsoever he pleases. For these reasons I concur in thinking that a nonsuit must be entered.

Rule absolute.

(*a*) *Cro. Jac.* 366.

1828.

DOE on the demise of JEFF and HUNTER *against* ROBINSON and Another.

Where the tenant of lands, granted *to him and his heirs* pur auter vie, devised them "to *A. B.*," without saying more, and *A. B.* died, living cestui que vie: Held, that the heir of the devisor was entitled to the lands as special occupant.

THIS was an action of ejectment on the demise of *Robert Jeff* and *Thomas Hunter*, the demise being laid on the 16th *May* 1827, against *John Robinson* and *Thomas Dowson Robinson*, for the recovery of certain lands in the township of *Northallerton*, in the county of *York*. Plea, not guilty. At the trial before *Bayley* J. at the *Yorkshire* Summer assizes 1827, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case: —

By a lease, dated the 24th of *November* 1783, and made between the Lord Bishop of *Durham* of the one part, and *Thomas Dowson* of the other part, the said bishop did demise, lease, and to farm let unto the said *Thomas Dowson*, his heirs and assigns, all that half oxgang of new land, arable, meadow, and pasture, with the appurtenances lying in the fields of *Northallerton* aforesaid, formerly called by the name of the *Chapel*

1828.

Doe dem. Jeff against Robinson.

mas Dowson being then in possession of the same premises under the said lease, devised as follows:—"I give my daughter, *Elizabeth Robinson*, my two houses, situated in *Bootham*, nigh the city of *York*, now tenanted by widow *Earl* and *William Collyer*, and my two closes, lying within the township of *Northallerton*, known by the name of the *Chapel Garths*, and west of the barn close (the said two closes being the lands in question, and part of the eight closes demised to *Thomas Dowson* by the Bishop of *Durham*). I also give her my desk in my parlour, and she to choose other furniture within my house, to furnish two rooms. I give my daughter *Parthenia Robinson*, my three closes called *Bullomoors*; and also one other close called *Barn Close*, all the aforesaid closes being within the township of *Northallerton*. I give her all the said four closes for and during her natural life, and at her decease I give the said four closes to her children then living, share and share alike; and I order that *Robert Robinson*, my son-in-law, shall have no concern either in letting the lands, or in taking any part of the rents from the lands. And as to all the rest of my estate, both real and personal, I give to my son *John Dowson*, and also a security for the payment of 20*l.* per annum for and during the life of my daughter *Ann Dowson*, he paying my said daughter *Ann Dowson* 40*l.* per annum, to be paid out of the rents arising from the *Turks Banks*; and also all my just debts and funeral expenses, and also for leasing the half oxgang after my decease; and, lastly, I make my said son *John Dowson* my sole executor of this my last will and testament." *Thomas Dowson* died on the 14th of *March* 1814, without having altered or revoked his said will, and upon his death, *Elizabeth Robinson* entered

1828.

Doe dem. Jeff against Robinson.

entered into possession of the premises thereby devised to her, and received the rents thereof until her death on the 1st of *February* 1826, at which period *John Dowson* and *Thomas Robinson*, two of the cestui que vies mentioned in the said lease were still living. After the death of *Elizabeth Robinson*, the defendants, her only children, entered into possession of the premises in question. *John Dowson*, the heir at law as well as residuary devisee and executor of *Thomas Dowson*, died on the 20th *February* 1827, having previously, by his will, duly made, executed, and attested to pass real estates, and bearing date the 20th *September* 1822, given and devised all and every his freehold lands, tenements, and hereditaments situate in the township of *Northallerton*, in the county of *York*; and all other his messuages, lands, and hereditaments whereof he was seised or entitled unto in reversion, remainder, or expectancy, situate in the township of *Northallerton* aforesaid, and in or near the suburbs of the city of *York* or elsewhere in the said county of *York*; and all his the said testator's personal estate unto the said *Robert Jeff* and *Thomas Hunter*, their heirs, executors, administrators, and assigns, according to the respective natures

1828.

Doe dem. JEFF against ROBINSON.

Alexander for the plaintiff. *Thomas Dowson* had in the lands in question a freehold estate, which, if undisposed of by will, would descend to his heir. It was not disposed of, except for the life of *Elizabeth Robinson*, and, therefore, at her death the heir of *Thomas Dowson* was entitled to the lands. There must be words of limitation, or words tantamount, in order to give more than a life estate. Now the devise by *Thomas Dowson* was merely "to *Elizabeth Robinson*," without more. On the other side, *Williams* v. *Jekyl* (*a*), and *Ripley* v. *Waterworth* (*b*), will probably be relied on to shew that an executor may be a special occupant; and thence it may be argued that the law will supply the word *executors*, and the devise in question may be considered as a devise to *Elizabeth Robinson* and her executors, and that the whole estate of *T. Dowson* would pass under those words. But in the former case the grant was originally to *A.* and his executors, and Lord *Hardwicke* treated the estate as being of a personal nature, and he distinguished it from "a descendible freehold to *A.* and his heirs." In *Ripley* v. *Waterworth*, Lord *Eldon*, indeed, says, that an executor may be a special occupant, but there the estate was expressly given to the party and his executors, and he cites *Westfaling* v. *Westfaling* (*c*) as an authority in point, but that is founded on a case in 2 *Roll. Abr.* tit. *Occupant*, (G) pl. 2. which cites *Dyer*, 328., and there no such point appears to have been decided. On the other hand, there are many cases in which it has been held that an executor cannot be a special occupant. In 2 *Roll. Abr. Occupant*, (G) pl. 3. it is said, "If a man grant a rent

(*a*) 2 *Ves.* sen. 681. (*b*) 7 *Ves.* jun. 440. (*c*) 3 *Atk.* 460.

to

1828.

Doe dem. Jeff against Robinson.

to another, his executors and assigns for the life of *T. S.*, and the grantee dies, making an executor but no assignee, the executor shall not be a special occupant for this, that it is a freehold which cannot descend to the executor." *Salter* v. *Butler*, found in several books (*a*), decided the same point. [*Bayley* J. If under a lease to *A.* and his executors, pur auter vie, the executor cannot be a special occupant, why can the heir where the grant is to *A.* and his heirs?] In *Com. Dig. Estates*, (F 1.) it is said, "So if a lease be to *A.* and his heirs pur auter vie, and *A.* dies, his heir shall be special occupant;" and the same rule is laid down in *Bac. Abr.* tit. *Estate for Life and Occupancy*, (B 3.). In *St. John's College* v. *Fleming* (*b*), it appeared that the Dean and Chapter of *Carlisle* made a lease to *T. S.* for three lives. Habend. to him, his executors, administrators, &c. for three lives; the lessee dying, the question was, Whether this should be looked upon as a descendible estate, and go to the heir, or whether the executor should have it. The Court decreed it to be in its nature an inheritable estate, and that it should go to the heir. And, in *Campbell* v. *Sandys* (*c*), Lord *Redesdale* dissented from the doctrine that an executor can be a special occupant. [*Bayley* J. Is not the real question here, how much did *T. Dowson* give away by his will?]

Cresswell for the defendants. The only question is, how much of the estate which *Thomas Dowson* had passed by his will. It is, therefore, quite unnecessary to enquire whether an executor can or cannot be a special

(*a*) *Cro. Eliz.* 901. *Yelv.* 9. *Moore*, 664. *Noy*, 46.
(*b*) 2 *Vern.* 320. (*c*) 1 *Scho. & Lef.* 288.

occupant.

1828.

DOE dem. JEFF against ROBINSON.

occupant. The point, however, is clear; there is not any authority for saying that an executor may not be a special occupant of *lands*. The case of *Salter* v. *Butler*, and the passage in 2 *Roll. Abr.* tit. *Occupant*, (G) pl. 3. related to a *rent*, and all the doubt (if any exists) upon this question has arisen from a want of discrimination between the grant of a rent and the grant of lands. The distinction between them is pointed out in *Bac. Abr.* tit. *Estate for Life and Occupancy*, (B 3). Then as to the question in this case; the words used by *Thomas Dowson* in devising the lands in question are sufficient to give the whole of his estate in them to the devisee. It has never yet been disputed that a general devise of lands to *A.* gives him an estate for his own life, provided the testator had so much to dispose of. But an estate for a man's own life, is in contemplation of law greater than an estate for the life of another, *Lewis Bowle's* case (*a*), and words sufficient to convey the greater estate must be sufficient to convey the lesser. It could not, therefore, be contended that an estate to *A.* for the life of another, or for the lives of any number of persons, would not pass by a general devise to *B.* without words of inheritance. If, then, the grant in question had been merely to *T. Dowson* for three lives, his devisee, *Elizabeth Robinson*, would have taken the whole of his estate, although it might happen to endure beyond her life. But the introduction of the word *heirs* into the original grant to *T. Dowson*, is supposed to affect the construction to be put upon the words of his will, and to confine their operation to the giving an estate to the devisee for her own life only.

(*a*) 11 *Co.* 83.

The

1828.

Doe dem. Jeff against Robinson.

The necessity for words of inheritance in order to convey more than an estate for the life of the grantee, arose from the strictness of the feudal law. In *Gilbert's Tenures*, p. 3. it is said, "Feuds are hereditary or for life. In hereditary feuds the word *heirs* is required to distinguish it from the original feud that was for life only;" and in note 8. this passage from *Craig* is cited, "Donationes sint stricti juris ne quid plus donasse præsumatur quam in donatione expresserit." The word *heirs* then was originally used for the purpose of measuring the quantity of estate granted. When applied to a grant pur auter vie, it has no such effect: whether it be or be not used, the estate parted with by the grantor is the same, and is commensurate with the life of cestui que vie; the estate taken by the grantee is the same, and he has the same disposing power over it; this is apparent from *Litt.* s. 56., and the commentary upon it, 1 *Inst.* 41. Neither does the word *heirs* in the grant of such an estate alter its quality. In either case it is simply an estate of freehold for life or lives, and *not an estate of inheritance*, *Edward Seymour*'s case (*a*). An estate to *A.* and his heirs has sometimes been termed a descendible freehold; but that description of it

[redacted]

1828.

DOE dem. JEFF against ROBINSON.

Doe v. *Luxton* (*a*) Lord *Kenyon* says that such estates have been improperly termed descendible freeholds, and in *Ripley* v. *Waterworth* Lord *Eldon* expressed a similar opinion. If then neither the quantity nor quality of the estate granted to *T. Dowson* was altered by the introduction of the word *heirs* into the grant, the only effect of it was to appoint a special occupant to take on the death of the grantee, provided he died without disposing of the estate. It cannot be contended that the estate, because created subject to special occupancy, could only be devised subject to special occupancy, for then even had the testator devised "all his estate" in the lands in question (words sufficient to pass a fee), that would not have sufficed to give this estate pur auter vie, because the devisee would not have taken it, subject to special occupancy, but on her death it would have gone to her executor, as assets under the statute, and the surplus would, after payment of debts, have been distributed amongst the next of kin. Upon principle, therefore, the defendants are entitled to a decision in their favour; and there are two cases expressly in point for them, *Williams* v. *Jekyl* and *Campbell* v. *Sandys*. In the former, a freehold lease for three lives was granted to *Elizabeth Elliott*, her executors, administrators, and assigns. She, for valuable consideration, made an assignment of the premises, and of her right, title, and interest in and to the same, to a trustee to the use of her son *J. W.*, for and during the term of his natural life, and from and after his decease to the use of his issue lawfully begotten, and for the want of such issue to the use of *E. L.*, her executors and administrators, during the residue of the

(*a*) 6 *T. R.* 291.

term.

1828.

Doe dem. Jeff against Robinson.

term. *J. W.* had a son, and Lord *Hardwicke* decided that the word *issue* there meant *children*, and that the son of *J. W.* took the whole estate; and he concludes his judgment by saying, "I have no doubt at all, but if it had been a plain assignment by her during the term to *J. W.*, without saying more, he would have the whole in him." That is a direct authority that a simple assignment of an estate, pur autre vie, to *A. B.* without more, is sufficient to take the whole away from a special occupant. Whether the special occupant designated in the original grant be the executor or heir of the grantee, cannot make any difference in principle. In *Campbell* v. *Sandys*, *D. C.* being seised of premises held by leases for three lives *to him and his heirs*, agreed to make a settlement on his son *John*, and *Anna* his wife, and to assign the premises to the use of himself for life, and after his decease to the use of *John C.* for life, and after his decease to the issue of the said *John* and *Anna*, and there Lord *Redesdale* held, that *issue* meant *children*, and that under this agreement, the equitable right to the absolute property vested in the only child of *John* and *Anna*.

Alexander in reply. In the case of *Williams* v. *Jekyl*,

[redacted]

1828.

Doe dem. Jeff against Robinson.

Bayley J. This was an ejectment by devisees claiming under the heir at law and residuary legatee of *Thomas Dowson*, against the children of *Elizabeth Robinson*, a devisee of the same *Thomas Dowson*. The property consisted of two closes at *Northallerton*, which *Thomas Dowson* held under a lease for lives from the Bishop of *Durham*. By that lease the closes were demised to *Dowson*, his heirs and assigns, for the life of himself and two other persons, and the life of the longer liver. By his will *Thomas Dowson* devised these closes to his daughter *Elizabeth Robinson*; but there were no words in the devise to shew an intention in the testator to pass his whole interest, nor any words of limitation; so that had the property been fee-simple, it is clear an estate for life only would have passed; and the question is, Whether it makes any difference that the property is not fee-simple, but an estate pur autre vie? At common law, as the original grant was to *Thomas Dowson and his heirs*, his heirs would have taken as special occupants upon his death, unless he had made an alienation in his lifetime to prevent it. Had he aliened in his lifetime to a particular individual, without any words of limitation, or any thing to extend that individual's estate beyond his life, his interest would have ceased upon his death. His representatives would have had no claim; and unless *Dowson*, or his heir, could have claimed it, it would have been open to general occupancy. By the statute of frauds, 29 *Car.* 2. *c.* 3. *s.* 12., such an estate as this is devisable in manner therein mentioned; and if no such devise thereof be made, it shall be chargeable in the hands of the heir, if it come to him as special occupant, as assets by descent, as in case of lands in fee-simple; and if there be no special

1828.

Doe dem. Jeff against Robinson.

occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands. Under this statute the owner of an estate, pur autre vie, may devise it to several in succession, so as to designate who shall occupy till cestui que vie dies, and to leave no interval or chasm (*3 P. Wms. 262.*); but I have not been able to meet with any case which decides what shall become of it, if it be only partially devised, that is, if it be devised for a period which expires before the estate pur autre vie ends. In such cases it must belong either to the representatives of the devisor, the representatives of the devisee, or become the subject of general occupancy. Upon the language of the *29 Car. 2. c. 3. s. 12.*, with the legislative explanation it receives from the *14 G. 2. c. 20. s. 9.*, it seems to me that it belongs to the devisor. The language of the *29 Car. 2.* is, that "*any estate* pur autre vie shall be devisable." If there be a devise which will provide for the occupancy till all the lives fail, the estate, that is, the whole estate, will be devised; upon a devise which may or must leave a chasm before all the lives fail; there is only a partial devise of the estate, and as to the residue there is no devise thereof. If, for instance, *A.* have an

1828.

DOE dem. JEFF against ROBINSON.

is not in terms mentioned whose heir is contemplated, it is shewn whose executor is contemplated, viz. the executor of the party that took the estate by virtue of the grant, which must mean the executor of the devisor, not the executor of the devisee. And if it be the devisor's executor that is contemplated when executors are mentioned, it must be the devisor's heir that is contemplated when the heir is mentioned. And this exposition of the 29 *Car.* 2. is supported and explained by the provision in the 14 *G.* 2. *c.* 20. *s.* 9. The former statute had made the undevised estate assets in the hands of the heir, or of the executor; but it had made no provision as to the residue, where the estate was made personal assets. The 14 *G.* 2., therefore, provides that estates pur autre vie, of which there shall be no special occupant, of which no devise shall have been made, *or so much thereof as shall not have been so devised*, shall go, be applied, and be distributed, in the same manner as the personal estate of the testator or intestate. That act, therefore, evidently proceeds upon the assumption that so much of an estate pur autre vie as is not subject to special occupancy, or has not been devised, is to pass to the executor. In this case, we think that judgment must be given for the lessors of the plaintiff, inasmuch as nothing but an estate for the life of *Elizabeth Robinson* is devised; of so much of the estate per autre vie as remained at her death, there was no devise, and that part, therefore, belonged not to the representative of *Elizabeth Robinson*, but to the heir of *Thomas Dowson* as special occupant, and not to his devisee.

Postea to the plaintiff.

1828.

DOE on the demise of HENNIKER *against* WATT.

By a memorandum of agreement, in consideration of the rent and *conditions* thereinafter mentioned, *A.* was to have, hold, and occupy, as on lease, certain premises therein specified, at a certain rent per acre. And it was *stipulated*, that no buildings should be included or leased by virtue of the agreement; and it was further *agreed and stipulated*, that *A.* should take, at the rent aforesaid, certain other parcels, as the same might fall in; and, lastly, it was *stipulated and conditioned* that *A.* should not assign, transfer, or underlet, any part of the said lands and premises otherwise than to his wife, child, or children: Held, that by the last clause a condition was created, for the breach of which the lessor might maintain an ejectment.

EJECTMENT brought to recover certain lands and premises in the county of *Somerset*. The cause was tried before *Burrough* J., at the Summer assizes for the county of *Somerset*, 1827. It appeared that the defendant in *October* 1825 became tenant to the lessor of the plaintiff of the premises in question, under and by virtue of the following instrument, signed by the defendant, and bearing date the 24th day of *October* 1825: " Memorandum of agreement made with *George Watt*, bailiff, of the manor of *Chalcott*, otherwise *Calcott*, in the county of *Somerset*. The said *G. Watt*, in consideration of the rent and conditions hereinafter mentioned, is to have, hold, and occupy, as on lease, every part and parcel of all that piece or tract of turbary land, commonly called *The Five Hundred Acres*, situate in the said manor, which may now be in hand and disengaged or unlet, for the term of twenty-one years from *Lady-day* 1825, at the yearly rent of 5*s.* an acre, payable quarterly, and free and clear of all charges, rates, and outgoings whatsoever; and is likewise to have, at the like rent of 5*s.* an acre, all and every parcel of the said *Five Hundred Acres* which may fall in hand and become unlet between this time and the expiration of the said term of twenty-one years; provided always, that the entire or total quantity of land in the

said

1828.

Doe dem. HENNIKER against WATT.

said *Five Hundred Acres*, occupied by the said *G. Watt* by virtue of this agreement, shall never exceed 100 acres in the whole; and that the term or lease of all and every parcel occupied or possessed under this agreement shall cease or determine in twenty-one years from *Lady-day* aforesaid. And it is stipulated that no house or cottage, stable or other substantial building, nor any parcel of land on which such building now stands, or may hereafter be erected, shall be included in or leased by virtue of this agreement. And it is further stipulated and agreed that the said *G. Watt* shall take and occupy, at the rent aforesaid, every parcel of land in the said *Five Hundred Acres* as the same may fall in hand, without choice, exception, or refusal, until the total quantity amounts to 100 acres as before mentioned. And also that *G. Watt* shall, on possession, proceed to cultivate and improve every parcel as the same comes to his occupation, whether it be late or early in the said term of twenty-one years, in like manner or method as he means towards the parcels of which he has immediate possession. And, lastly, it is stipulated and *conditioned that* G. Watt *shall not assign, transfer, underlet, or part with any part or parcel* of the said lands or premises otherwise than to his wife, child, or children." It was proved that the defendant had underlet part of the demised premises; and it was insisted, on the part of the lessor of the plaintiff, that the last clause in the agreement operated as a condition, and that the underletting was a breach of that condition. The learned Judge was of opinion that the clause did operate as a condition, but he reserved liberty to the defendant to move to enter a nonsuit on that point, if the verdict should be against him. The defendant

1828.

Doe dem. Henniker against Watt.

then gave some evidence which, it was contended, clearly shewed that the defendant had underlet with the knowledge, and in some degree by the directions of the lessor of the plaintiff, and amounted to a waiver, if not to an express licence. The learned Judge thought that the evidence applied to other lands of the lessor's which the defendant managed as his bailiff, and directed the jury to find a verdict for the plaintiff. *Jeremy* in last *Michaelmas* term obtained a rule nisi for a nonsuit, on the ground that the clause prohibiting the defendant from assigning or underletting did not operate as a condition, but merely as a covenant; and, secondly, for a new trial, on the ground that the evidence of licence had not been distinctly presented to the jury.

On a former day *Moody* shewed cause. The clause in the agreement, whereby the tenant was prohibited from under-letting, is a condition. The words "sub conditione," "provided always," or "ita quod," of themselves, in a conveyance of real property, make estates upon condition, *Litt.* s. 328, 329. There are other words which, in such an instrument, make an estate upon condition, provided a power of re-entry is added to them,

1828.

Doe dem. HENNIKER against WATE.

estate conditional, as "quod non licebit dare, vendere, vel concedere statum sub pœnâ forisfacturæ;" and *Litt.* s. 365. shews, that as to chattels real, as leases for years, a man may plead that such leases were made upon condition, without shewing any writing of the condition. In *Plowd.* 142. it is said, "If a man make a feoffment in fee to one, ad erudiendum his son in an art, it is a condition, because the words purport such intent, and, therefore, they are conditional, although there are not the usual words." It may be urged, that conditions are considered to be odious in law, and that they are to be construed strictly, *Co. Litt.* 219 *b. Vin. Abr. Condition* (E r.). This is said of the construction of acts alleged to be forfeitures of admitted conditions to defeat estates, not words doubtful whether they amount to a condition. Here there can be no doubt that it was the intention of the lessor to prevent the lessee from underletting, and the most effectual mode of doing so was to make the lease void on his doing such an act. The words, "provided always, and it is covenanted and agreed," create both a condition and a covenant, *Co. Litt.* 203 *b*, *Cromwel's* case. (*a*)

Jeremy contrà. First, this is only an agreement, and not a deed, and it is doubtful whether a condition can be reserved upon that which amounts to a mere parol contract; and although a lease of land upon condition may be pleaded without deed, 1 *Roll. Abr.* 414. 3 *Vin. Abr. Condition* (R), 69., yet an estate upon condition cannot. The instrument in this case contains no words of present demise, but is only that the defendant shall

(*a*) 2 *Co.* 270.

1828.

Doe dem. Henniker against Watt.

hold "as on lease." Conditions, the effect of which is to destroy an estate, being odious in law, are to be strictly construed, and not to be created without sufficient words, *Machel* v. *Dunton* (*a*). Here, also, if the clause in question operates as a condition, all the preceding clauses must equally operate as conditions. But as the lease professes to pass land in reversion as well as in possession, the condition cannot apply to the lands which the lessee was to take in reversion after the determination of the previous estates for lives, and which might never come in esse. If the clause in question occurred in a deed, it would operate as a covenant, but not as a condition, *Doe d. Willson* v. *Phillips* (*b*), and *Doe d. Wilson* v. *Abel* (*c*). The proper words, according to Lord *Coke*, 204 *b.*, to make a condition, are "*sub conditione*" (which is the most express and proper), or "*proviso semper*, *itaquod*, or *quod si contingat*," which last words always require something else, as, a clause of re-entry, &c. *Litt. s.* 328. The words in this instrument, "it is stipulated and conditioned," must be construed according to the intention of the parties in reference to the particular subject-matter, and must be taken either as a covenant or condition, but not

[redacted]

1828.

Doe dem. HENNIKER against WATT.

is partly in possession, partly in reversion, and some portion of it might never arise. The condition cannot apply to the estate in reversion, because the lessee could not assign or underlet the lands of which he was never in possession, nor could the lessor take advantage of breaches of the condition by parcels, as in waste, by which he may recover the particular place wasted. And even if the clause might be construed either as a condition or a covenant, yet upon the principle that words shall be construed most strongly against the party using them, the court will not construe it as a condition, if by so doing it be repugnant to the estate granted, or uncertain as to the extent to which it is to operate; and at all events the instrument is *equivocal*, whether it passes any interest upon which a condition can operate. Assuming that the clause amounts to a condition, of the breach of which the lessor might take advantage; there was evidence that the underletting had been made by the defendant with the knowledge and concurrence of the lessor; no forfeiture, therefore, accrued; or if any forfeiture had been incurred, it was a clear waiver, if it did not amount to an express license to underlet the particular lands, and should have been so presented to the jury.

Cur. adv. vult.

BAYLEY J. This was an ejectment brought for breach of a condition contained in an agreement for a lease. There are two questions; first, Whether the agreement contained a condition or not? the second, Whether the plaintiff had not destroyed his right to enter upon the lands demised for the breach of the condition?

because

1828.

Doe dem. Henniker against Watt.

because the act constituting the supposed breach was done with his concurrence. The Court, at the time of the argument, felt that this question had not been submitted to the jury, and, therefore, held that there ought to be a new trial, even if there was a condition contained in the agreement. But if there was no such condition, then there ought to be a nonsuit. The parties stood in the relation of landlord and tenant. There was an agreement made between the lessor of the plaintiff and defendant, by which the defendant, in consideration of the rent and conditions thereinafter mentioned, was to have, hold, and occupy, as on lease, every part and parcel of the turbary land called *The Five hundred Acres*, &c. which might then be underlet or disengaged, for twenty-one years from *Lady-day* 1826, at the rent of 5*s*. per acre, payable quarterly, clear of all charges and outgoings whatsoever; and to pay the like rent of 5*s*. per acre for all and every parcel of the *Five hundred Acres* which might fall into hand or come into possession before the expiration of the said term of twenty-one years. Then it was stipulated that no house, &c. should be included in or leased by virtue of the agreement; and it was further stipulated that the said *G. Watt* should take and

[redacted]

1828.

Doe dem. HENNIKER against WATT.

ment is not under seal; and it has been said by the defendant's counsel that it is not therefore calculated to raise a condition. But the circumstance of its not being under seal is immaterial. A party who demises land by an instrument not under seal may introduce a condition into it, provided he use apt and proper words for the purpose. The words "provided always, sub conditione, ita quod," used in a conveyance of real estate, by themselves, make the estate conditional. But in a lease for years no precise form of words is necessary to make a condition. It is sufficient if it appear that the words used were intended to have the effect of creating a condition. They must be the words of the landlord, because he is to impose the condition. Here, first, the agreement purports to be in consideration of the rent and *conditions* thereinafter mentioned; and then the words "it is stipulated" occur more than once; and then, in the last sentence of the instrument, come the words, "it is lastly stipulated and conditioned, that *Watt* shall not assign, transfer, underlet, or part with any part of the lands, otherwise than to his wife or children." These words are clearly introduced into the instrument on the part of the lessor, for they are for his benefit. The word *conditioned* is fairly a word of condition. In pleading, a bond is stated to be conditioned for payment of money. It is said that the word *stipulated* and the word *conditioned*, being used together, have the same meaning, and import a covenant, and not a condition; but there are several authorities which shew that if words both of covenant and condition are used in the same instrument, they both shall operate. If the word *stipulated* import a covenant, it will operate as such; and

if

1828.

Doe dem. Hanniers against Ward.

if the word *conditioned* import a condition, it must also operate. In *Simpson* v. *Titterell* (*a*), one *Benbow* let the land to the defendant *proviso semper* and it was further covenanted that the lessee should not assign except to the lessor. These words were held to create a condition; because it was a general rule that where a proviso is that the lessee shall perform or not perform a thing, and no penalty to it, this is a condition, otherwise it is void; but if a penalty is annexed, it is otherwise. So in *The Earl of Pembroke* v. *Sir H. Berkeley* (*b*), where there was a grant of a walk in a forest, "provided also, and the said grantee doth covenant not to fell or cut any wood but for necessary browse," and the heir of the grantee cut down four oaks, the question was, Whether this was a condition or a covenant? *Gawdy* and *Clench* thought it was a covenant only, but *Popham* and *Fenner* thought it was a condition; and afterwards, upon a conference amongst all the justices of *England*, it was held by the greater part of them to be a condition. In *Harrington* v. *Wise* (*c*), where the words were, "it is covenanted and agreed between the parties that *Harrington* doth let the lands for five years, *provided always*, that *Wise* shall pay to the defendant

1828.

Doe dem. HENNIKER against WATT.

hath but an estate on condition. Lord *Coke*, in commenting on that section in *Co. Litt.* 203 *b*, says, So it is if a man by indenture letteth land for years; provided always, and it is covenanted and agreed between the said parties that the lessee shall not alien; and it was adjudged that this was a condition by force of the proviso, and a covenant by force of the other words. We are of opinion, therefore, that by the last clause of the instrument in question a condition was created; and that being so, the rule for a nonsuit cannot be made absolute. But we think the rule should be absolute for a new trial, because there was evidence to shew that the land was underlet by the defendant with the consent and express licence of the lessor, and that evidence was not submitted to the jury.

Rule absolute for a new trial.

WHYTT *against* M'INTOSH and Others.

Where a defendant obtains a mandamus under 13 *G.* 3. *c.* 63. *s.* 44. for examining witnesses in *India*, the plaintiff, gaining the cause, is entitled to the costs of cross-examining those witnesses.

THE defendant in this case obtained a mandamus for the examination of witnesses in *India*. The plaintiff cross-examined those witnesses, but did not examine any witnesses in chief under the mandamus. At the trial in this Court the depositions were read; and the plaintiff having obtained a verdict, the Master, on the taxation of costs, allowed him the expense incurred in cross-examining the witnesses in *India*.

Joshua

1828.

WHYTT against M'INTOSH.

Joshua Evans obtained a rule to shew cause why the Master should not review his taxation; against which, in *Easter* term,

Wightman shewed cause. The statute 13 *G.* 3. *c.* 63. *s.* 44., which gives this Court power to issue writs of mandamus for the examination of witnesses in *India*, assumes that it confers a benefit on the party applying for the writ. It would, therefore, be very unjust if the opposite party should, as to the costs, be placed in a worse situation than if the witnesses had been brought here. If the act had not passed, and the witnesses had been brought here, the plaintiff gaining the cause would have had his costs. By means of the writ, the defendant has had the benefit of the testimony of his witnesses without the expense of bringing them, which is a sufficient reason why the plaintiff should not have to bear the expense of sending out to *India* to cross-examine those witnesses. The plaintiff was not a consenting party to the writ; the case, therefore, differs from *Stephens* v. *Crichton* (*a*), which was a case of examination upon interrogatories, that being, as Lord *Ellenborough* observed, "a matter of indulgence and consent."

[redacted]

would have been entitled to the costs of the examination of his witnesses in chief. The question is, therefore, of no small importance. The plaintiff was at liberty to sue in *India*; and if he prefers bringing his action in *England*, and on that account is put to greater expense, he has no cause for complaint. In courts of equity the commission to examine witnesses abroad issues in invitum, and the party asking it is compelled to pay the costs; but the expense of cross-examination is nevertheless borne by the party making it. Here the plaintiff might have opposed the writ, and asked the Court to impose terms as to the costs. All costs in actions are given by act of parliament, and they cannot be treated as costs in the cause unless the successful party is entitled to them, whichever that may be.

Cur. adv. vult.

On a subsequent day, in *Easter* term, the judgment of the Court was delivered by

Lord TENTERDEN C. J. We have considered of this matter, and are of opinion that the rule for a review of the Master's taxation must be discharged. It was urged that it has not been usual to allow such costs as those now claimed; but if the plaintiff be entitled to them that is not a sufficient reason for now withholding the allowance. The Court had no power to refuse the mandamus. The defendant had a right to demand it under the statute 13 *G.* 3. *c.* 63.; but that statute is silent as to the costs of such a proceeding; it is, therefore, in the breast of the Court to say whether the costs in question ought or ought not to be allowed. Now the defendant having obtained a mandamus to examine witnesses on his

1828.

WHYTE against M'INTOSH.

his behalf, it was just that the plaintiff should have an opportunity of cross-examining them, and that he should be reimbursed the expense incurred in so doing. On this ground it seems to us that the Master did right in taxing those costs for the plaintiff.

Rule discharged.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED 1828.

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Ninth Year of the Reign of GEORGE IV.

The KING *against* ROBERT BROOKS.

Friday, June 6th.

Where a party had been sworn into, and had exercised a corporate office for more than six years, the Court, in the exercise of their discretion, and without deciding whether he was protected by the 32 *G.* 3. *c.* 58., refused to grant a quo warranto information against him, on the ground of his not having been sworn in before the proper officer.

IN last *Hilary* term a rule was obtained at the instance of one *Payne*, a burgess of *Wells*, calling upon *Robert Brooks* to shew cause why an information in the nature of quo warranto should not be filed against him for usurping the office of a master of the city of *Wells*. The rule was granted on two grounds: first, that he was unduly elected, there not having been a sufficient number of electors present; secondly, that he had not been sworn in. By the affidavits it was stated, that by the governing charter of the corporation of the city of *Wells* it was provided that there should be one mayor and twenty-three capital burgesses who should be a common council, and that of those twenty-three seven

1828.

The KING against BROOKS.

should be masters; that vacancies in the office of masters were to be filled up by election out of the capital burgesses, by the residue of the capital burgesses, or the greater part of them, and that the new master should take an oath of office before the mayor, recorder, and six other of the capital burgesses. And they further stated, that on the 6th of *July* 1821, *R. Brooks* was elected a master at a meeting where the mayor, three masters, and seven capital burgesses only were present. That the recorder was not present there or at any time when the oath prescribed by the charter was administered to *R. Brooks*.

The affidavits in answer stated that *R. Brooks* was sworn in on the 13th of *August* 1821, and had ever since exercised the office of a master of the city of *Wells*.

It was afterwards referred to the master of the crown office to enquire whether *R. Brooks* was sworn into the said office or not, and how he was so sworn.

The master now reported that "*R. Brooks* was sworn in on the 13th of *August* 1821, not before the recorder of the borough, but at a convocation or meeting that was held at the town-hall of the mayor, masters, and

1828.

The KING *against* BROOKS.

question, six years or more before the exhibiting of such information, such six years to be reckoned and computed from the day on which such defendant so pleading was actually admitted and sworn into such office or franchise." The object of the statute appears to have been to remedy an irregular election; and hitherto it has been confined to that. There is no case where it has been held applicable to an undue swearing in. Swearing in before the wrong officer cannot be considered as a compliance with the charter; the party, therefore, must be treated as not sworn in; and if so, the statute cannot protect him, for the six years are to be computed from the swearing in. Again, by the stat. 55 *G.* 3. *c.* 184., a stamp is imposed upon the admission to a corporate office, and it does not appear that *Brooks* was admitted.

Lord TENTERDEN C. J. As this gentleman has been in the actual exercise of the office in question for more than six years, I think we shall best exercise our discretion in giving effect to the spirit of the statute 32 *G.* 3. *c.* 58. by refusing to interfere. It is not necessary to give any opinion as to the construction of that part of the statute which speaks of "actually swearing in," for the Court is not bound to interfere at the instance of an individual; and as it was clearly the intention of the legislature that six years' enjoyment of a corporate office should secure the possession of it, I think we ought not to interfere.

Rule discharged.

Taunton and *Campbell* were to have opposed the rule.

1828.

Saturday, June 7th.

GRIMMAN *against* LEGGE.

A. demised to *B.* the first and second floor of a house for a year, at a rent payable quarterly. During a current quarter, some dispute arising between the parties, *B.* told *A.* that she would quit immediately. The latter answered, she might go when she pleased. *B.* quitted, and *A.* accepted possession of the apartments: Held, that *A.* could neither recover the rent, which, by virtue of the original contract, would have become due at the expiration of the current quarter; nor rent pro rata, for the actual occupation of the premises for any period short of the quarter.

ASSUMPSIT for use and occupation. Plea, general issue. At the trial before Lord *Tenterden* C. J., at the *Middlesex* sittings after last term, it appeared that in *October* 1826, the plaintiff agreed to let to the defendant for a year from the 25th of *December* following, at a rent of 50*l.*, payable quarterly, the first and second floor of a house in *York Street, Bryanstone Square.* The defendant entered at *Christmas*, and paid a quarter's rent on the 25th of *March* 1827. In *April* a dispute having taken place between the plaintiff and defendant, the latter said she would quit. The plaintiff said she might go when she pleased, and he should be glad to get rid of her. The defendant began to remove her furniture on the following day, and continued removing it for three days. On the 19th of *April* she delivered the keys of the rooms to the plaintiff, and he accepted them. Upon this Lord *Tenterden* told the jury that the defendant was liable to pay the quarter's rent due at midsummer 1826, unless there was an agreement between the plaintiff and defendant that the latter should quit without paying any rent, and he directed them to find for the defendant if they thought from the evidence that such an agreement was made between the parties. The jury having found a verdict for the defendant,

Campbell now moved for a new trial. Assuming that there was evidence of a license given by the landlord to

1828.

GRIMMAN against LEGGE.

to the tenant to quit, *Mollett* v. *Brayne* (*a*) shews that the landlord is entitled to recover the whole quarter's rent. There the landlord, having had a dispute with his tenant, told him that he might quit when he pleased; and the tenant accordingly quitted in the middle of the quarter: it was held that the landlord was entitled to recover in an action for use and occupation for the whole quarter, on the ground that a tenancy from year to year created by parol, cannot be determined by a parol license from the landlord to quit in the middle of a quarter, and the tenant's quitting the premises accordingly, because there is a subsisting term in the premises, which cannot be surrendered except by deed or note in writing, or by act and operation of law. [*Bayley* J. There the plaintiff did not accept possession of the demised premises. A parol license to quit will not of itself operate as a surrender of the tenant's interest. But where the tenant gives up possession in pursuance of such a license, and the landlord accepts it, the license, coupled with the fact of the change of possession, operates as a surrender by act and operation of law, and the landlord cannot recover any rent which becomes due after his acceptance of the possession.] According to *Whitehead* v. *Clifford* (*b*), the landlord could not recover the whole quarter's rent; but unless that which took place between the parties amounted to an eviction, the plaintiff must be entitled to rent pro rata. [*Holroyd* J. Where, by express contract, rent is reserved, payable quarterly, the landlord cannot recover a proportionable part of the rent for the occupation of his premises for any period less than a quarter.] If

(*a*) 2 *Campb.* 103. (*b*) 5 *Taunt.* 518.

1828.

GRIMMAN *against* LEGGE.

the delivering up the keys by the plaintiff, and the acceptance of them by the defendant, was a surrender by act and operation of law, the express promise to pay the rent at the end of every quarter was at an end, and then a promise to pay pro rata may be implied.

Lord TENTERDEN C. J. There was an express contract to pay a quarter's rent at *Midsummer;* before that time arrived, some dispute arose between the parties. The tenant said to the landlord, I shall quit; and the latter said, you may do so, and I shall be glad to get rid of you. The defendant then removed her furniture, and sent the keys of the rooms to the plaintiff, and he accepted them. I thought that the jury might presume that the original contract between the parties was rescinded.

BAYLEY J. *Whitehead* v. *Clifford* (*a*) shews that the plaintiff cannot recover the rent for the whole quarter. But then it is said he is entitled to recover rent pro rata for so long a time as the defendant occupied the premises. Where there is an express contract between the parties, none can be implied. The plaintiff, therefore, having destroyed his right to recover the rent according to the contract, has destroyed it altogether. Where a party by agreement engaged to pay freight on arrival at a specified port, and the ship never arrived at that port, but landed her cargo at an intermediate point, and it was accepted by the freighter: it was held that the plaintiff was not entitled to recover a proportionable part of the freight for such part of the voyage as the ship performed; because where there is an express contract, the law will

(*a*) 5 *Taunt.* 518.

not

1828.

GRIMMAN *against* LEGGE.

not imply one (*a*). So in this case, the parties having entered into an express contract, by which the rent was to be paid quarterly, I think the law will not imply a contract to pay rent for any period less than a quarter.

Rule refused.

(*a*) *Cook* v. *Jennings*, 7 *T. R.* 381.

The KING *against* The Justices of BERWICK-UPON-TWEED.

Saturday, June 7th.

A rate in the nature of a county rate may be levied in *Berwick-upon-Tweed*, that being a place not subject to the commission of the peace of any county in *England*, and never having contributed to a rate made for any county, although it does not lie within the body of an *English* county, and although no rate had ever been levied there before, the corporation having defrayed out of their own funds the charges to which the sums raised by a county rate are applicable.

BY charter reciting that the borough of *Berwick-upon-Tweed* was an ancient borough, and the mayor, bailiffs, and burgesses thereof an ancient corporation, King *James* the First granted that the said borough should be and remain a free borough, and that the men of the borough should be free burgesses, and that the mayor, bailiffs, and burgesses of the borough should be a body corporate, by the name of the mayor, bailiffs, and burgesses of the borough of *Berwick-upon-Tweed*, with power to make bye-laws for their government, and impose fines for breach of those bye-laws; that a coroner should be appointed by the mayor, bailiffs, and burgesses to do and execute every thing which belonged to the office of coroner; and that they should be partakers of all assessments and charges with the rest of the burgesses of the borough, as often as the borough should be taxed for the good state and maintenance thereof; that the inhabitants not being burgesses, nor free of the borough, should be partakers in all assessments and charges in the borough reasonably

1828.

The King against The Justices of Berwick-upon-Tweed.

made for the state and maintenance thereof; that the mayor, bailiffs, burgesses, and their successors, or the greater part of them, for the necessity and good of the borough, the goods and chattels of the burgesses, and of all other inhabitants of the borough and liberties thereof, as to them should seem best, should reasonably tax, and taxation and tallage impose, and the same taxation and tallage levy and cause to be levied as before in the borough used and accustomed without hinderance of the said king; that all sums of money arising by these taxes should be to the use of the chambers of the borough for the necessity, profit, and public good of the borough. The king then granted that the mayor, bailiffs, and burgesses might have within the borough a prison or gaol for the keeping of all prisoners committed within the borough or liberties; that the mayor of the borough for the time being, and the recorder, and such burgesses or aldermen as had sustained the office of mayor should be his majesty's justices to keep the peace within the borough, liberties, and precincts; and that they should have power to enquire, hear, and determine within the borough, &c. all manner of felonies, murders, &c. misdeeds, causes, and articles which did belong or might

1828.

The KING *against* The Justices of BERWICK-UPON-TWEED.

mitted within the borough, or before the mayor, recorder, and bailiffs in the court of the borough, and before the mayor, recorder, and the said aldermen, or any three or more of them, as justices of the peace or of gaol delivery within the borough; and further, all the seigniory, manor, borough, town, and sock of *Berwick-upon-Tweed*, with all and singular their rights, members, and appurtenances, and all houses, &c. within the said seigniory, manor, borough, town, and sock being, and also certain lands and fields to the borough adjoining (there described), to have and hold the said seigniory, &c. and all other and singular the premises granted by the charter, with all their appurtenances, to the mayor, bailiffs, and burgesses, and their successors, to the only proper use and behoof of the said mayor, bailiffs, and burgesses of the said borough, and their successors in fee for ever, yielding to the king yearly for the seigniory, &c. 20*l*. The charter was accepted by the corporation. The seigniory, &c. so granted still remains the property of the mayor, bailiffs, and burgesses; the annual revenue arising from the seigniory, &c. amounts to 12,000*l*., more than one half of that sum is annually divided among the burgesses, and widows of burgesses, resident in the borough, for their individual use and benefit. Besides paying all the charges and expenses borne by the mayor, bailiffs, and burgesses, their revenue is more than sufficient to pay all the sums which in the borough would be payable by and out of a rate in the nature of a county rate, if such a rate could be legally made and established in the borough. The borough and its liberties are bounded on the south by the river *Tweed*, on the east by the

German

1828.

The King against The Justices of Berwick-upon-Tweed.

German ocean, and on the north by that part of the United Kingdom called *Scotland*. It did formerly lie within *Scotland*, and constituted one of the royal boroughs of that kingdom. It never did lie within any county in *England*, and is not now nor ever was a county of itself. No rate in the nature of a county rate was ever assessed or levied within the borough before the year 1828. At a court of quarter sessions, held on the 28th of *April* in that year, an order was made that a rate or assessment should be made upon the borough in the nature of a county rate, and that 150*l.* should be levied for and towards such a rate. The justices issued their warrant on the 30th of *April* to the high constable of the borough, commanding him to issue his warrant to the churchwardens and overseers of the poor of the parish of *Berwick-upon-Tweed* within his district, commanding them within thirty days after the receipt of the warrant, to pay to him the sum of 150*l.* so charged and assessed upon the said parish; and that upon receipt of the same, the said high constable should at or before the next quarter sessions pay the same into the hands of *W. P.*, the treasurer appointed to receive the same. The borough and parish

1828.

The KING against The Justices of BERWICK-UPON-TWEED.

certain statutes in that case made and provided. The bridge over the *Tweed*, at *Berwick*, is kept in repair by the corporation by virtue of a contract with government, under which the corporation annually receive 100*l.* The corporation have always paid the following charges which in *England* are usually paid out of the county rate, namely, the gaoler's salary, and the expenses of erecting and repairing the gaol of *Berwick*, and of maintaining the prisoners therein; the expenses attending the execution of felons; the expenses of conveying convicts to the place appointed by his majesty's secretary of state in order to transportation, and of providing the standard weights and measures.

A rule nisi had been obtained for removing into this Court the order of sessions for making the rate in the nature of a county rate, and the warrant directed to the high constable to cause the same to be levied, upon the ground that the justices of *Berwick-upon-Tweed* had no power to make such a rate, inasmuch as the statute 55 *G.* 3. *c.* 51. *s.* 24. applied to such boroughs only as lie within the body of some *English* county; and, secondly, that even if *Berwick* were within the words of the act, it was not within the intent of the legislature, inasmuch as it had large revenues of its own, part of which had at all times been applied to those purposes to which a county rate is usually applied; and even if they were insufficient, the corporation had, by charter, a power of taxing the inhabitants.

F. Pollock and *Ingham* now shewed cause. As to the first point, it is true that *Berwick* is not within any *English* county; but it satisfies every material requisite of the act. It is a part of the realm of *England*, *Rex* v. *Cowle*,

1828.

The KING *against* The Justices of BERWICK-UPON-TWEED.

Cowle (*a*), and is declared by statute 20 *G.* 2. *c.* 42. *s.* 3. to be comprehended "in all cases where the kingdom of *England* is mentioned in any act of parliament." It has a separate commission of the peace, and is not liable to any county rate. These circumstances are said by *Le Blanc* J. in *Weatherhead* v. *Drewry* (*b*), to be all that are necessary to bring a place within the 13 *G.* 2. *c.* 18. *s.* 7., which extends the power of making a county rate to the justices in all places therein mentioned. By the statute 5 & 6 *W.* & *M.* *c.* 11., made perpetual by 8 & 9 *W.* 3. *c.* 33., every defendant removing an indictment for a misdemeanor from the court of quarter sessions is required to enter into a recognizance, conditioned to try the issue joined in the indictment at the next assizes for the county wherein the said indictment was found. Now it has always been the practice for the defendant, removing an indictment from the quarter sessions of *Berwick*, to enter into a recognizance to try the issue at the assizes for *Northumberland*; and *Berwick* has, therefore, for the purposes of that act, been taken to be within the county of *Northumberland*. *James* v. *Green* (*c*) and *Weatherhead* v. *Drewry* (*d*) shew that there is no ground for the objection, that the revenues of the corporation should have been applied to defray those expenses for which the rate in question was imposed. The facts in this case are stronger in favour of the propriety of the rate than even in the cases of *Nottingham* and *Derby*, for the grant to each of those corporations was expressed to be to the intent that they should maintain the public charges of the town; but in the case of *Berwick* the clause of the charter confirming former

(*a*) 2 *Burr.* 834.
(*b*) 11 *East*, 176.
(*c*) 6 *T. R.* 228.
(*d*) 11 *East*, 168.

grants,

1828.

The KING *against* The Justices of BERWICK-UPON-TWEED.

grants, expresses them to be to the only proper use and behoof of the mayor, bailiffs, and burgesses, without any designation of the purposes to which they are to be applied.

The Solicitor-General contrà. *Berwick-upon-Tweed* was formerly part of *Scotland.* It never formed part of any county in *England;* and that being so, neither the statute 55 *G.* 3. *c.* 51. *s.* 24. nor the 13 *G.* 2. *c.* 18. *s.* 7. authorizes the corporation of *Berwick* to levy on the inhabitants of that place a rate in the nature of a county rate. Those statutes only apply to places lying within the body of an *English* county. Each of them enacts, in nearly the same words, that where any cities, towns, *or other places* within that part of *Great Britain* called *England,* have commissions of the peace within themselves, and are not subject to the jurisdiction of the commission of the peace *of the counties at large, in which such liberties or franchises lie,* and do not, nor did before the passing of the act, contribute or pay to the several rates *made for the said counties at large,* then it shall be lawful for the justices to make a rate in the nature of a county rate. The statute 20 *G.* 2. *c.* 42. *s.* 3. must be so qualified as to be held not to apply to cases where the legislature makes enactments for a county. *Berwick-upon-Tweed* not being a liberty or franchise lying in an *English* county, is not within the words of the statute, nor is it within the intent. For the mayor and burgesses have not only large funds in their possession to enable them to defray all the charges to which a county rate is usually applied, but they have the power of taxing the inhabitants, and thereby raising money for all those purposes to which a county rate is usually applied.

Lord

1828.

The King against The Justices of Berwick-upon-Tweed.

Lord TENTERDEN C. J. I cannot entertain a doubt that it was the intention of the legislature, in the statutes 13 *G.* 2. *c.* 18. *s.* 7., and 55 *G.* 3. *c.* 51. *s.* 24., to include every place that had a jurisdiction of its own, and did not contribute to the county rate, and was not subject to the commission of the peace of any county. We ought to put such a construction on the words of the act as will best satisfy that intention. If the words used in their ordinary import are a little too narrow, we ought, in furtherance of the intention of the legislature, to extend them to meet a particular case. *Berwick* has a separate jurisdiction; it is not subject to the commission of the peace of any county, and does not, nor did, before the passing of the statute 55 *G.* 3. *c.* 51. *s.* 24., contribute or pay to the rate made for any county. The words are, "did not pay or contribute to the rates made for the said counties at large." I think we must understand the words "said counties at large," to mean any county at large. *Berwick-upon-Tweed* does not, indeed, lie within any *English* county, but that is immaterial. Any town or place which has a separate jurisdiction, and is not subject to the commission of the peace of any county, and does not contribute to the rate

1828.

BARNARD PINNEY *against* JOEL PINNEY.

Saturday, June 7th.

In trover for a chattel claimed by the plaintiff, as vendee of an executor, the will is not evidence of the title of the executor. The probate must be produced.

TROVER for a horse and gig. Plea, not guilty. At the trial before Lord *Tenterden* C. J., at the *Middlesex* sittings after last *Easter* term, the following appeared to be the facts of the case: — The defendant's father died in *March* 1827, having left several testamentary papers. *Francis Pinney*, the defendant's brother, claimed to be executor, and the defendant also. The Ecclesiastical Court, at the time of the trial, had not granted probate of any of the wills. *Francis Pinney* sold to the plaintiff the horse and gig (which had been part of the property of the testator); but before and after such sale, the defendant frequently used it, and finally carried it away, and converted it to his own use. *Francis Pinney*, being called as a witness, stated that he was one of the executors of his father, and that he sold the horse and gig to the plaintiff. The plaintiff then offered to give in evidence the wills or testamentary papers by which *Francis Pinney* was appointed executor. It was objected, that a will of personal estate was of no effect until probate; that it was no will until it was allowed as such in the spiritual court, it being for that court to judge whether it be a will or not. (*a*) Lord *Tenterden* C. J. held the production of the probate to be necessary to prove the title to personal property under the will, and

(*a*) *Chaunter* v. *Chaunter*, cited in *Viner, Executors* (A a), 20., and 4 *Burn. E. L. Wills, Probate*, 7.

refused

1828.

PINNEY against PINNEY.

refused to receive the will itself. No probate having been produced, he said, that if the plaintiff had proved a clear undisputed possession, it might have been sufficient; but here it appeared, that the defendant before and after the sale to the plaintiff used the horse and gig. The plaintiff had no exclusive possession, and *Francis Pinney* could have no title as executor, unless the will was allowed by the spiritual court, and probate was obtained. The plaintiff elected to be nonsuited.

Gurney now moved for a new trial; and contended, that one of several executors might, before probate, sell the property of the testator, and give a good title to the vendee, and that before probate the will must be the only evidence of the right of the executor. [*Bayley* J. When the probate is granted, then, by virtue of the will, all the property of the testator vests from the time of his death in the executor; you did not prove that *Francis Pinney* was an executor, for no probate was proved. Non constat that the will under which he claimed to be executor is a valid will, unless it be allowed as such by the Ecclesiastical Court. Here the horse and gig were delivered to the plaintiff, who had no title to them.]

1828.

JONES *against* KENRICK.

Tuesday, June 10th.

By the *Welsh* judicature act, 5 *G.* 4. *c* 106. *s.* 21., it is enacted, that in all transitory actions which shall be brought in any court of record out of the principality, and the debt or damages recovered shall not amount to 50*l.*, and it shall appear on the evidence given on the trial that the cause of action arose in the principality, and that the defendant was resident in *Wales* at the time of the service of any writ or other mesne process served on him in such action, and it shall be so testified under the hand of the Judge who tried the cause, a judgment of nonsuit shall be entered: Held, that it is discretionary in the Judge who tries the cause to grant or refuse the certificate mentioned in the act; and that where the Judge has refused to certify, this Court has no power to order a judgment of nonsuit to be entered.

Held, by Lord *Tenterden* C. J. at Nisi Prius, that it lies upon the defendant to shew that he was residing in *Wales* at the time when the writ or mesne process was served on him in the action, and that general evidence that his usual place of residence both before and subsequent to the commencement of the action, was in *Wales*, is not sufficient.

ASSUMPSIT for goods sold. Plea, non assumpsit.

At the trial before Lord *Tenterden* C. J., at the *Middlesex* sittings after last *Easter* term, it appeared that the action was brought to recover 9*l.*, the price of certain vermin traps sold by the plaintiff to the defendant. The sale was made, and the delivery took place, in the principality of *Wales*, where the defendant resided at the time of the sale and delivery, and had generally resided ever since. The jury found a verdict for the plaintiff to the amount of 9*l.* The counsel for the defendant then applied to Lord *Tenterden* C. J. to certify, on the back of the record, that the cause of action arose in the principality of *Wales*, and that the defendant resided there at the time of the service of the writ, in order that a suggestion might be entered on the roll under the 5 *G.* 4. *c.* 106. *s.* 21. (*a*); but

(*a*) By sect. 21. of that statute it is enacted, that in all actions upon the case for words, action of debt, &c., and all transitory actions which shall be brought in any of his majesty's courts of record out of the principality of *Wales*, and the debt or damages found by the jury shall not amount to the sum of 50*l.*, and it shall appear upon the evidence given on the trial of the said cause that the cause of action arose in the principality of *Wales*, and that the defendant was resident in the dominion of *Wales at the*

1828.

JONES against KENRICK.

but his Lordship said, that if the defendant was served with the writ while he resided out of the principality of *Wales* it was not a case within the act of parliament, and that it lay on the defendant to shew, that at the time when the writ or process was served on him he was actually residing in *Wales;* and there being no such evidence, his Lordship refused to certify.

Brougham now moved to enter a nonsuit. The damages recovered not having exceeded *50l.*, the defendant is entitled to a judgment of nonsuit. The act of the *5 G. 4. c.* 106. *s.* 21. only says that the defendant must be *resident* in *Wales* at the time of the service of the writ. Here it was proved that his usual place of residence was in *Wales.* Assuming, therefore, that the defendant was not actually in *Wales* at the time of the service of the writ, still it is sufficient if his usual place of residence was there. The act does not confine the remedy to cases where the party is actually in *Wales* at the time of the service of the writ, but to cases where he is resident in *Wales.* Now, suppose a party, whose usual place of residence is in *Wales,* to come into an *English* county for a temporary purpose; as, for example, a physician

1828.

JONES *against* KENRICK.

case, though actually in an *English* county, would be resident in *Wales* at the time of the service of the writ.

Lord TENTERDEN C. J. The defendant by the act of parliament is to have a judgment of nonsuit, if it shall be testified under the hand of the Judge who tries the cause, upon the back of the record of nisi prius, that the defendant was resident in *Wales* at the time of the service of the writ. It is discretionary in the Judge to grant or refuse a certificate. Here the Judge who tried the cause has not certified. The Court, therefore, has no power to order such a judgment to be entered.

Rule refused.

LESTER *against* JENKINS.

Tuesday, June 10th.

Declaration upon a bill of exchange, drawn on the 29th *November* 1827, payable two months after date, was entitled generally of *Hilary* term, 1828: Held, that it was competent to the plaintiff to prove by the parol evidence of the attorney (without producing the writ) that the action was commenced after the 1st of *February*, when the bill became due.

ASSUMPSIT by the indorsee against the defendant, as acceptor of a bill of exchange bearing date the 29th day of *November* 1827, payable two months after date. At the trial before Lord *Tenterden* C. J., at the *London* sittings after last *Easter* term, it appeared that the declaration was entitled generally of *Hilary* term, and that the bill of exchange became due on the 1st of *February*. It was contended, on the part of the defendant, that as the declaration was entitled generally of the term, it related to the first day of the term, and that the action, therefore, appeared to have been commenced before the cause of action accrued. The plaintiff's attorney then proved that he did not receive his instructions to commence the action until the bill had been dishonoured, and that he took no proceedings

1828.

LESTER *against* JENKINS.

until after the first of *February*. It was insisted that this evidence of the time of the commencement of the suit was not admissible, but that the writ itself ought to have been produced. Lord *Tenterden* C. J. overruled the objection, and directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit.

Brodrick now moved accordingly. A declaration entitled generally of the term relates to the first day of the term. It was formerly doubted whether any evidence could be given to contradict the record, but it must now be admitted, that the time of the commencement of the suit may be shewn to be different from that which it appears to be by the record, *Morris* v. *Pugh and Harwood* (*a*), *Granger* v. *George* (*b*). The usual and proper mode of proving the time of the commencement of an action is by producing the writ. It cannot otherwise be shewn that the writ was sued out in the particular cause. Nor can parol evidence of the contents of the writ be properly received.

Lord TENTERDEN C. J. The indorsement on the

[redacted]

1828.

LESTER *against* JENKINS.

ferent from that which it purports to be by the record. The only question in this case is, Whether that can be shewn by any other medium of proof than the writ. I cannot entertain any doubt upon that point. A party cannot prove the contents of the writ without producing it; but he may prove the time when the action was commenced, without proving the contents of the writ.

Rule refused (*a*).

(*a*) See *Wilton* v. *Girdlestone*, 5 *B.* & *A.* 847. *Lyttleton* v. *Cross*, 3 *B.* & *C.* 317.

The KING *against* SMITH and Two Others.

Wednesday, June 11th.

Where an indictment for a conspiracy alleged, that "at the court of quarter sessions holden, &c. an indictment against *A. B.* was preferred to, and found by the grand jury:" Held, that this allegation must be proved by a caption regularly drawn up of record, and that the minute-book kept by the deputy clerk of the peace could not be received as evidence of the finding of the bill, although no record had been in fact drawn up.

INDICTMENT for a conspiracy. The second count stated, that at the general quarter sessions of the peace holden at, &c. on, &c. before certain of his majesty's justices assigned, &c. a certain bill of indictment against *Henry Smith*, for a certain felony therein mentioned, was duly preferred to and found by a certain grand jury of the county then and there duly assembled in that behalf, and that it then and there became and was material and necessary to examine one *W. B.* as a witness in support of such indictment, and that defendants conspired to prevent *W. B.* from attending and being examined, &c. The third and fourth counts began in like manner, by stating that a bill was preferred and found at the quarter sessions. There were several other counts in the indictment not material to be noticed. Plea, not guilty. At the trial before *Vaughan* B. at the Summer assizes for *Monmouthshire*, 1827, the prosecutor, in order to prove the allegation that a bill

1828.

The King against Smith.

was found against *H. Smith*, called the deputy-clerk of the peace, who produced an indictment indorsed a true bill, but there was no general heading or caption to it. For the defendants, it was objected that this could not be admitted for want of a caption. The witness then stated, that it was not the practice to make up the records in form until they were desired to do so, but that in his book minutes were made of the proceedings from which the records were afterwards made up. The book was produced, and the following minute read: "*Monmouthshire* sessions, 10th *July* 1826. At the general quarter sessions of the peace held at *Usk* in and for the said county, this 10th day of *July* 1826, before *A. B.*, *C. D.*" &c. &c. Then followed minutes of the business done at those sessions. The learned Judge received this as evidence of the caption of the indictment against *H. S.*, and two of the defendants were found guilty on the second, third, and fourth counts above mentioned. In *Michaelmas* term *Ludlow* Serjt. obtained a rule nisi for a new trial, on the ground that the minute-book of the deputy-clerk of the peace ought not to have been received in evidence to prove the finding of the bill.

of the proceedings of inferior courts, the court of quarter sessions is a court of oyer and terminer, and is not a court of inferior jurisdiction.] In *Rex* v. *Tooke* (*a*) the minutes of the court were received to prove the acquittal of *Hardy*.

Lord TENTERDEN C. J. It appears to me that the evidence given was not sufficient to sustain the allegation that an indictment against *H. S.* was found at the quarter sessions, which is a court of oyer and terminer and a court of record. In order to prove the finding of an indictment, it has always been the practice to have the record regularly drawn up, and to produce an examined copy. If any other evidence were allowed, I do not know how we could say that a conviction or acquittal might not also be proved by the minutes in the book kept by the clerk of the peace. That would be to break through the established rules of evidence, which is always a dangerous course. I therefore think we are bound to say that the evidence was not sufficient, and that as to the two defendants who were found guilty there must be a new trial. The case of *Rex* v. *Tooke* is distinguishable; for there the matter proved by the minutes occurred before the same court sitting under the same commission.

BAYLEY J. I am of the same opinion. The caption is a necessary part of the record; and the record itself, or an examined copy, is the only legitimate evidence to prove it.

Rule absolute.

(*a*) 25 *St. Tr.* 446.

1828.

Thursday, June 12th.

Ex parte BAXTER.

Where a party, committed by commissioners of bankrupt for not answering to their satisfaction, wishes to be again brought before them, he must bear the expense of that proceeding.

PLATT moved for a mandamus to commissioners of bankrupt to bring up *Baxter* from custody for examination before them. It appeared by the affidavit on which the motion was founded that *Baxter* had been examined before them touching the property of a bankrupt, and was committed for not answering to their satisfaction. He afterwards sent word to them that he was prepared to make further answers, and requested to be brought before them for that purpose.

Per Curiam. The object of the application appears to be to avoid the expense of a writ of habeas corpus, and throw upon the estate of the bankrupt the costs of bringing this party before the commissioners. But the Court have no authority to do that: he was committed for his own misconduct, and must bear the expense of being brought before the commissioners; for which purpose he may apply for a writ of habeas corpus when

1828.

TEAGUE *against* HUBBARD.

Friday, June 15th.

A member of a joint-stock-company was employed by the company as their agent to sell goods for them, and received a commission of two per cent. for his trouble, and one per cent. del credere for guaranteeing the purchaser. Having sold goods on account of the company, he drew on the purchaser a bill of exchange, payable to his the drawer's own order, and after it had been accepted he indorsed it to the actuary of the company, and the latter indorsed it to another member, who was the managing director, and who purchased goods for the company: the company were then indebted to him in a larger amount than the sum mentioned in the bill. The acceptor having become insolvent before the bill became due, the drawer received from him ten shillings in the pound upon the amount of the bill by way of composition: Held, first, that the indorsee being a member of the company could not sue the drawer on the bill, inasmuch as it was drawn by the latter on account of the company, and that he could not recover the sum received by the drawer on the bill, because that money must be taken to have been received by him in his character of a member of the company, and not on his own account.

DECLARATION by the plaintiff as indorsee against the defendant as drawer of two bills of exchange; counts for money had and received, &c. Plea, general issue. At the trial before Lord *Tenterden* C. J., at the *London* sittings after *Trinity* term, 1827, the following appeared to be the facts of the case: The plaintiff was a shareholder and managing director of the *Cornish* Tin-Smelting Company. The defendant was a shareholder in that company, and also acted as the agent of the company in the sale of tin, receiving a commission of two per cent. for effecting sales, and an additional del credere commission of one per cent. for guaranteeing the purchaser. Having sold a quantity of tin on account of the company to one *Richard Conness*, he, on the 1st of *April* 1826, drew two bills of exchange upon *Conness*, one for 200*l.*, and the other for 133*l.* The 200*l.* bill was in the form following: "Two months after date, pay to my order 200*l.*, value received." This bill was accepted by *Conness*, indorsed by *Hubbard* to *W. Mears*, who was the actuary of the company, and by the latter to *Teague*. The other bill, which was for 133*l.*, was precisely in the same form, and had similar indorsements. The plaintiff purchased tin

for

1828.

TRAGUE against HUSBAND.

for the company, and at the time when the bills were indorsed to him the company were indebted to him in a sum exceeding the aggregate amount mentioned in the two bills. The plaintiff was debited in his account current with these bills. *Conness* became insolvent before they became due. The plaintiff failed in proving due notice of dishonour of the bill for 133*l.*, but proved that the defendant had received from *Conness* ten shillings in the pound upon the amount of that bill. It was objected, on the part of the defendant, that as the bill for 200*l.* was drawn and indorsed by the defendant on account of the company, the plaintiff being a co-partner could not sue upon it as indorsee; and that he could not recover from the defendant the money received by the latter on account of the bill for 133*l.*, because that money was received by him in his character of a member of the company, and not in his individual character. Lord *Tenterden* directed the jury to find a verdict for the plaintiff for the amount of the bill for 200*l.*, and of the composition received by the defendant on the other bill, but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

1828.

TEAGUE *against* HUBBARD.

event of *Conness* becoming insolvent before the bills became due, he would be responsible. If he drew the bills in that character, he indorsed them in the same character on his own account to *Mears*, and the latter, although a member of the company, might have maintained an action against *Hubbard*. At all events, the bills were indorsed by *Mears* to the plaintiff for a valuable consideration. The plaintiff bought tin for the company, and at the time when the bills were indorsed to him the company were indebted to him in a sum exceeding the amount of the bills. The plaintiff had an account current with the company, and was debited in that account with these bills. He did not hold them as a member of the company, but in his individual character as an indorsee for value. Secondly, assuming that the plaintiff cannot recover on the bill for 200*l.*, he is entitled to recover on the count for money had and received the amount received by the defendant on the bill for 133*l.* That money was received by the defendant in his individual character, and not as a member of the company. He received it for himself as drawer of the bill, and having received that part from the acceptor, it is money had and received to the use of the indorsee.

F. Pollock and *Follett* contrà. The question in this case must be considered wholly independent of the del credere commission. First, Was the contract contained in the bills of exchange made by the defendant in his individual character, or in that of a member of the company? The company or partnership consisted of the plaintiff, the defendant, and *Mears*. Whether or not there were other partners did not appear. The form of the

1828.

TEAGUE against HUBBARD.

the bills is material. It is "pay to my order." That must have meant the order of the partnership, the debt being due to the concern. The whole transaction shews that the bills were drawn on account of the company, for they were drawn for the price of the goods of the company sold to the acceptor by the defendant, and indorsed by him to *Mears*, the actuary of the company, and by him as actuary to the plaintiff. If then the plaintiff was acting as one of the partners, as there can be no doubt that one partner may draw a bill on behalf of the firm, the firm are liable, *Pinkney* v. *Hall* (*a*), *Smith* v. *Jarves* (*b*), *Lord Galway* v. *Mathew* (*c*). These clearly were bills drawn by the partnership, and in whatever way the plaintiff, one of the partners, became entitled to them, he cannot sue another partner upon them, *Mainwaring* v. *Newman* (*d*), *Moffatt* v. *Van Millingen* (*e*), and *Neale* v. *Turton* (*f*). [Lord *Tenterden* C. J. Assuming that the bills are to be considered as drawn by the company, and that the plaintiff, therefore, cannot sue the defendant on the bills, yet here he, being one of several partners, has guaranteed a debt to the firm, and has received from the debtor a part of the debt, may not the other partners maintain an action against him for the money so received? Has not the plaintiff in this case a right to say that the money received by the defendant on account of one of these bills was received by him not in the character of a partner but in his individual character, and to relieve himself from a payment he would by virtue of his

(*a*) 1 *Ld. Raym.* 175.
(*b*) 2 *Ld. Raym.* 1484.
(*c*) 1 *Camp.* 403. 10 *East*, 264.
(*d*) 2 *Bos. & Pul.* 120.
(*e*) 2 *Bos. & Pul.* 124. *n.*
(*f*) 4 *Bing.* 149.

guaranty

guaranty be liable to make to the partnership? Although the plaintiff cannot recover on the bill itself by reason of the partnership, may he not recover the sum actually received by the defendant, the receipt of the money not being a partnership transaction?] The defendant received the money as agent for all the members of the partnership, the plaintiff being one. The plaintiff, therefore, cannot sue the defendant, his copartner, for money received by him on account of the partnership.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord TENTERDEN C. J. This was an action against the defendant as drawer of two bills of exchange, and for money had and received. It appeared that the bills were signed by the defendant, and indorsed by him to *Mears*, who was the actuary for a mining company, and by the latter to the plaintiff. Notice of the dishonour of one of the bills was not proved; but it appeared that the defendant had received 10*s.* in the pound from the acceptor on the other bill, and for that sum a verdict was taken on the count for money had and received. It further appeared, that both the plaintiff and defendant were members of the mining company. If, therefore, the plaintiff could recover on these bills, it would be a recovery by one joint contractor against another, and then the defendant would have a right to call upon the plaintiff for contribution. It is clear, therefore, that no action can be maintained upon the bills; but during the argument, I thought the verdict taken on the count for money had and received

might

1828.

TEAGUE *against* HUBBARD.

might be sustained. Upon further consideration, however, we think that the defendant must be taken to have received the money, not in his individual capacity, but as a member of the trading company; and that being the case, if the plaintiff were allowed to recover it in this action the same consequence would follow, the defendant would have the same right to call upon the plaintiff for contribution, as if the verdict had been taken on the count framed upon the bill. For these reasons we are of opinion that a nonsuit must be entered.

Rule absolute.

Saturday, June 14th.

The KING *against* PULSFORD.

Where an election to an office in a corporation was to be made by a select body appointed by the charter to be aiding the mayor: Held, that the mayor was not bound to give to the members of such select body specific notice of a meeting to be holden for the purpose of such election; but that a reasonable and usual notice requiring them to attend at a meeting of the corporation at a time specified, without stating for what purpose the meeting was called, was sufficient.

QUO warranto information for usurping the office of a capital burgess of the city of *Wells*. Plea, that by the governing charter of the borough there are to be one mayor and twenty-three burgesses, who shall be called the common council, and of those twenty-three, seven to be called masters of the city; and the common council are to be aiding and assisting the mayor from time to time in all causes and matters touching and concerning the city; and whenever a vacancy occurs in the sixteen common counsellors, not being masters, it is to be filled up by the other common counsellors then surviving, or the major part of them, &c. Averment, that on, &c. a vacancy happened, and that defendant was duly nominated and elected by the mayor and major

part

1828.

The KING against PULSFORD.

part of the capital burgesses then and there duly assembled for that purpose, after due notice in that behalf. Replication, that due notice of the assembling of the mayor and capital burgesses for the purpose of electing a capital burgess was not given. Issue thereon. Many other issues were joined not material to the question decided by this Court. At the trial before *Best* C. J. at the *Somersetshire* Summer assizes, 1827, it appeared that the following notice in writing was given to each capital burgess of the meeting at which the defendant was elected: —

" Sir, — You are requested to attend a meeting of the corporation on, &c. at o'clock.

" By order of the mayor,

" *A. B.* town clerk."

The Lord Chief Justice held that this notice was insufficient, and the election therefore invalid, and directed a verdict for the crown. In *Michaelmas* term a rule nisi for a new trial was obtained; against which, on a former day in this term,

Taunton, *Campbell*, *C. F. Williams*, and *Bayly*, shewed cause. If it was necessary that the purpose for which the meeting was held should be specified in the notice, that given was clearly insufficient. Now there are several authorities shewing that a corporate meeting cannot be well holden for the purpose of an election unless notice of the business to be transacted there is given. The case of *Rex* v. *Hill* (*a*) is not exactly in point, for there the election was by the body at large, and not by a select body; but each of the learned Judges there laid it down

(*a*) 4 *B.* & *C.* 426.

as

1828.

The KING against PELSFORD.

as a rule that whenever a meeting for the purpose of an election is held on a day not appointed by the charter, notice of the meeting, and of the purpose for which it is assembled, must be given to every person resident within the limits of the borough, and entitled to vote at the election. This rule is consistent with the cases of *Rex* v. *The Mayor, &c. of Shrewsbury* (*a*), *Rex* v. *Mayor, &c. of Carlisle* (*b*), *Rex* v. *Mayor of Liverpool* (*c*), *Rex* v. *Mayor of Doncaster* (*d*). It is also recognized in *Rex* v. *Theodorick* (*e*), where it was held that when all persons entitled to vote were present, and consenting, they might proceed to an election without previous notice.

R. C. Scarlett and *Carter* contrà. In *Rex* v. *Hill* the Court are certainly represented to have said, that where a meeting for an election is held not on a charter-day, notice of the meeting, and of the purpose for which it is holden, must be given. But that question was not raised upon the pleadings, and the point decided was, that a custom to give notice of corporate meetings by ringing a bell was, under the circumstances of that case, unreasonable. Several cases were mentioned in the argument there, which were supposed to support the

[redacted]

1828.

The KING against PULSFORD.

must be given of the time of meeting, and that it is to do some corporate act, though *what particular act need not be specified.*" The decision in *Rex* v. *Carlisle* was merely this, that where certain members of a corporation forming a select body are to act as a select body, they must be summoned to attend in that capacity. In *Rex* v. *The Mayor of Liverpool* a question was raised as to notice of the business to be done, but the case was not determined on that point. In *Rex* v. *Wake* (*a*) it was held, that where notice was given of a corporate meeting for one purpose, the parties assembled could not go on to other business unless the whole body were met, and did it by consent. That was very reasonable, and quite different from this case, for the notice there virtually excluded all business but that specially mentioned.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord TENTERDEN C. J. The point on which this cause was decided at Nisi Prius was the supposed insufficiency of the notice of holding the meeting at which the defendant was elected. Now it appears that some days before the meeting a notice in writing signed by the town clerk, and importing that it was sent by the mayor, was delivered to each elector, requiring his attendance at a corporate meeting, on a certain day, at a particular hour, but not specifying the purpose for which the meeting was about to be holden. The Lord Chief Justice of the Common Pleas was of opinion that the purpose should have been specified, and on that ground directed

(*a*) 1 *Barnard*, 80.

1828.

The KING *against* PULSFORD.

assisting the mayor on all occasions concerning the city, when required so to do. It is, therefore, their duty to attend whenever the mayor gives them reasonable notice that their attendance is required; and we think they are not at liberty to say that they abstained from attending because they did not know the specific purpose for which the meeting was about to be holden. If, indeed, it had appeared to be usual in this borough to give a more precise notice, the case would have been very different; but nothing of that kind is suggested. For these reasons, then, we think that the notice was sufficient, and that there must be a new trial.

Rule absolute.

The KING *against* The Commissioners of Sewers for the Levels of PAGHAM, and certain other Places in the County of SUSSEX.

Saturday, June 14th.

Where commissioners of sewers acting bonâ fide for the benefit of the levels for which they were appointed, erected certain defences against the inroads of the sea, which caused it to flow with greater violence against, and injure the adjoining land not within the levels: Held, that they could not be compelled to make compensation to the owner of the land, or to erect new works for his protection; for that all owners of land exposed to the inroads of the sea, or commissioners of sewers acting for a number of land-owners, have a right to erect such works as are necessary for their own protection, even although they may be prejudicial to others.

A RULE had been obtained calling upon the commissioners to shew cause why a mandamus should not issue, directed to them, commanding them to issue a precept to the sheriff of the county of *Sussex* to summon a jury for the purpose of enquiring what hurt, loss, or disadvantage hath been sustained by *W. Cosens* by reason of certain groynes and other works erected and made by the said commissioners within the limits of the said levels,

1828.

The King against Pulsford.

that a verdict should be entered for the crown; and it has been since contended here, that as the meeting was held for an election, that should have been stated in the notice. It would be very difficult to maintain that the object of the meeting must be stated, where it is for an election, and not where it is for other purposes. Many cases were cited in argument as in point, but, upon a review of them all, it appears that there is not any one decision proceeding on the ground that specific notice was necessary, although certainly there are dicta to that effect, as well as to the contrary. In *Rex* v. *Hill* the election was by the body at large, which is a very different thing. And even in that case, although each of the learned Judges expressed an opinion that the purpose for which the meeting was held should have been mentioned, yet, laying that point entirely out of consideration, the judgment stands good on other grounds. The point expressly decided was, that the notice given, as stated in the pleas, was not a reasonable notice, of which there could be no doubt; for, consistently with every allegation on that record, the bell which was to give notice might be rung for a few minutes only, and those assembled might, as soon as it

1828.

The KING *against* PULSFORD.

assisting the mayor on all occasions concerning the city, when required so to do. It is, therefore, their duty to attend whenever the mayor gives them reasonable notice that their attendance is required; and we think they are not at liberty to say that they abstained from attending because they did not know the specific purpose for which the meeting was about to be holden. If, indeed, it had appeared to be usual in this borough to give a more precise notice, the case would have been very different; but nothing of that kind is suggested. For these reasons, then, we think that the notice was sufficient, and that there must be a new trial.

Rule absolute.

The KING *against* The Commissioners of Sewers for the Levels of PAGHAM, and certain other Places in the County of SUSSEX.

Saturday, June 14th.

Where commissioners of sewers acting bonâ fide for the benefit of the levels for which they were appointed, erected certain defences against the inroads of the sea, which caused it to flow with greater violence against, and injure the adjoining land not within the levels: Held, that they could not be compelled to make compensation to the owner of the land, or to erect new works for his protection; for that all owners of land exposed to the inroads of the sea, or commissioners of sewers acting for a number of land-owners, have a right to erect such works as are necessary for their own protection, even although they may be prejudicial to others.

A RULE had been obtained calling upon the commissioners to shew cause why a mandamus should not issue, directed to them, commanding them to issue a precept to the sheriff of the county of *Sussex* to summon a jury for the purpose of enquiring what hurt, loss, or disadvantage hath been sustained by *W. Cosens* by reason of certain groynes and other works erected and made by the said commissioners within the limits of the said levels,

1828.

The KING *against* Commissioners of Sewers for PAGHAM, SUSSEX.

and of assessing and ascertaining the compensation to be paid to the said *W. Cosens* for the same; or to erect and make such other works as should be necessary and sufficient to prevent further injury being done to the premises of the said *W. Cosens* by reason of the said groynes and other works above mentioned.

The rule was obtained on affidavits which stated that *Cosens* was owner of certain lands on the sea-shore of *Sussex*, abutting on the west on the levels above mentioned; that, thirty years ago, he erected a mill 100 yards from high water mark, and that about that time the commissioners altered the groynes and other works, which had been before erected to protect the level against the inroads of the sea, by taking away several small groynes, and erecting one large groyne in lieu thereof, at the easternmost point of the levels, and adjoining his (*Cosens's*) land. That the effect of this groyne was to cause the sea to flow with increased force against his land; and that in consequence thereof his land had been gradually washed away until high water mark was within fifteen yards of his mill. That his property was thereby much reduced in value, and that he had made application to the commissioners for compensation and

1828.

The KING *against* Commissioners of Sewers for PAGHAM, SUSSEX.

a view to the protection of the levels, and not for the purpose of injuring *Cosens*. That the effect of every groyne was to make the water flow with greater force against the land to the eastward, but that if *Cosens* erected proper groynes for his own security his property would not be injured.

Gurney, *Thesiger*, and *Capron* shewed cause, and contended that the commissioners had no power to grant compensation to *Cosens*. Their commission extends only to lands within the level, and the statute does not enable them to summon a jury to assess the quantum of damage sustained by any person not having lands there. Neither can they be compelled to make new works for *Cosens*'s protection; they have acted bonâ fide, to the best of their skill and judgment in the execution of their duty towards the owners of the lands within the level; and if they have not exceeded the powers vested in them, nor have acted wantonly and oppressively, to the injury of *Cosens*, they are not responsible for the consequences of their acts.

Brodrick contrà. The question is of great importance; for although the works erected by the commissioners may be for the benefit of the level, they are certainly very injurious to *Cosens*; and if he cannot obtain redress by this mode, he is altogether without remedy. No action will lie against the commissioners, they are protected by the commission; but it was distinctly said by the Court in the case of *Cardiffe Bridge* (*a*) that commissioners of sewers are subject to the inspection of this Court by

(*a*) 1 *Salk*. 146.

1828.

The KING against Commissioners of Sewers for PARHAM, SURREY.

writ of mandamus; and that they are to exercise a legal, not an arbitrary discretion, is laid down as an established principle of law in *Rook*'s case (*a*), and *Keighly*'s case (*b*). The commissioners might, in the first instance, have made compensation to *Cosens*; for when the groyne was made, they had to summon a jury to ascertain the expense, and the proportions in which it was to be borne; compensation to a party who would be injured by the work might very fairly have been considered as a part of the expense, and in that mode justice might have been done. In *Callis on Sewers*, 104., it is said, "Ubi nova sit maris incursio, ibi novum est apponendum remedium, with this caution, that under the pretence of the common weal, a private man's welfare be not intended, to the charge, trouble, and burthen of the county; and with this also, that where any man's particular interest and inheritance is prejudiced for the commonwealth's cause, by any such new-erected works, that that part of the county be ordered to recompense the same, which have good thereby." Mr. *Cosens*, then, having been injured by the new groyne made for the benefit of the level, ought to be compensated by the owners of the land within the level. But, admitting

[redacted]

1828.

The KING *against* Commissioners of Sewers for PAGHAM, SUSSEX.

store a rail-road which had been taken up; and in *Rex* v. *The Vice-Chancellor of Cambridge* (*a*), *Wilmot* J., as to granting a mandamus, said, "If there is a clear right, the Court ought to find out a suitable and adequate remedy, and even to make a precedent, if they cannot find one; for where there is a right, law and justice require that there should be some remedy or other." Here, then, *Cosens* has sustained damage in consequence of the groyne erected by the commisssioners. Further damage will ensue unless new works for his protection are erected; and the question in effect comes to this, viz. at whose expense those works ought to be erected. It is but just that they who have occasioned the injury should pay for the remedy; and if so, the Court will find a mode of compelling them to do it.

Lord TENTERDEN C. J. I am of opinion that this rule must be discharged. At the time when the motion was made the Court expressed great doubt whether it could be sustained. The matter has now been fully discussed, and the counsel for Mr. *Cosens* concluded by observing that it was reduced to this question, Who is to bear the expense of erecting the works necessary to protect *Cosens*'s land? and I think he is perfectly correct in considering that as the substantial question. Let us see, then, how the matter stands. The commissioners of sewers, for the protection of that land which it was their duty to protect, have erected a certain work. It is not pretended that in so doing they did not exercise, at least, an honest discretion; and, looking at the affidavits on the one side and on

(*a*) 3 *Burr.* 1660.

1828.

The KING against Commissioners of Sewers for PAGHAM, SUSSEX.

the other, it is not by any means clear that they did not do the very best thing that, under the circumstances, could be done to attain the object they had in view. But it is contended that this new groyne has caused the sea to flow with greater violence against the land of Mr. *Cosens*, and make a greater inroad upon it, than possibly it might otherwise have done; and that as the commissioners, acting for the benefit of the level, have occasioned this damage, they must make compensation for it. It may be conceived that such is the effect of the groyne; but the sea is a common enemy to all proprietors on that part of the coast, and I cannot see that the commissioners, acting for the common interest of several land-owners, are, as to this question, in a different situation from any individual proprietor. Now, is there any authority for saying that any proprietor of land exposed to the inroads of the sea, may not endeavour to protect himself by erecting a groyne or other reasonable defence, although it may render it necessary for the owner of the adjoining land to do the like? I certainly am not aware of any authority or principle of law which can prevent him from so doing. If we were in this instance to say that the commissioners

1828.

The KING *against* Commissioners of Sewers for PAGHAM, SUSSEX.

defences against the sea along the whole line of coast from the level of *Pagham* to the *North Foreland*; for so far, I believe, the sea is making inroads upon the land. The extent to which the principle must be carried, if once admitted, satisfies me that it cannot be sustained in reason or in law. I am, therefore, of opinion that the only safe rule to lay down is this, that each land-owner for himself, or the commissioners acting for several land-owners, may erect such defences for the land under their care as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy. For these reasons, the rule for a mandamus must be discharged.

BAYLEY J. I am entirely of the same opinion. It seems to me that every land-owner exposed to the inroads of the sea has a right to protect himself, and is justified in making and erecting such works as are necessary for that purpose; and the commissioners may erect such defences as are necessary for the land entrusted to their superintendence. If, indeed, they made unnecessary or improper works, not with a view to the protection of the level, but with a malevolent intention, to injure the owner of other lands, they would be amenable to punishment by criminal information or indictment, for an abuse of the powers vested in them. But if they act bonâ fide, doing no more than they honestly think necessary for the protection of the level, their acts are justifiable, and those who sustain damage therefrom must protect themselves. It has been argued that Mr. *Cosens*, having sustained damage from the groyne erected by the commissioners, is entitled to compensation. I do not agree to that as an abstract pro-

1828.

The King against Commissioners of Sewers for Pagham, Sussex.

proposition. If a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title those two things must concur, damage to himself, and a wrong committed by the other. That he has sustained damage is not of itself sufficient. Now here Mr. *Cosens* may have sustained damage, but the commissioners have done no wrong. The dictum of Mr. Justice *Wilmot* was cited to shew that where there is a right this Court ought to find a remedy. But the right that Mr. *Cosens* and each land-owner has, is to protect himself; not to be protected by his neighbours. To that right no injury has been done, nor can any wrongful act be charged against the commissioners; the Court, therefore, have no grounds for granting the mandamus applied for.

Holroyd and Littledale Js. concurred.

Rule discharged.

[redacted]

1828.

The KING *against* GREET.

Information for usurping the office of jurat of the borough of *Q.* Plea, that the borough of *Q.* was a free borough, and that the burgesses of the borough were a body corporate, consisting of the mayor, bailiffs, and burgesses of the borough, and that by charter it was granted that the

QUO warranto information for usurping the office of jurat of *Queenborough.* Plea (admitting *Queenborough* to be an ancient borough) that the said borough from the 10th of *May* in the forty-second year of the reign of Lord *Edward* the Third, formerly king of *England*, until the granting of the charter next thereinafter mentioned, was a free borough, and that the burgesses of the said borough during all that time were a body corporate, consisting of the mayor, bailiffs, and burgesses of the borough of *Queenborough*, &c. and that by charter 2 *Car.* 1. (the governing charter of the borough),

mayor, bailiffs, and burgesses, by whatever name they had before been incorporated, should thereafter be a body corporate by the name of "mayor, jurats, bailiffs, and burgesses;" that there should be one of the more honest and discreet burgesses *or* inhabitants called "mayor," to be elected as therein mentioned; and four honest and discreet burgesses *or* inhabitants called "jurats;" and two other honest and discreet burgesses *or* inhabitants called "bailiffs;" that the jurats and bailiffs should hold their offices for life, unless removed for reasonable cause; and whenever it should happen that either or any of the jurats or bailiffs for the time being should die, or be removed or withdrawn from his or their office or offices, it should be lawful for the surviving and remaining jurats and bailiffs for the time being, or the greater part of them (of whom the mayor should be one), within convenient time, to nominate another or others of the burgesses *or* inhabitants of the borough for the time being to be a jurat or jurats, bailiff or bailiffs, of the borough. The plea then stated a vacancy in the office of jurat, and that the defendant, being an inhabitant of the borough, was duly elected to be a jurat. Replication, first, putting in issue the due election of the defendant; and secondly, that from the time of granting the charter, hitherto it had been used and accustomed within the borough, that every inhabitant of the borough elected to be a jurat, before he took upon himself the office of jurat, should be sworn and admitted a free burgess of the borough, and that the defendant, before he took upon himself the office of jurat, had not been admitted and sworn a burgess. Demurrer. Upon the trial of the issues, in fact, it appeared that, at the election of the defendant, there were present the mayor, two bailiffs, and two jurats: Held, that the election was valid, for the general rule, that a majority of each definite part of the elective body should be present at the election, could not apply to this corporation, because in the event of the death or removal of one of the bailiffs, it would be impossible that at the election of a new bailiff there should be present a majority of the bailiffs.

Held, upon demurrer to the replication, that according to the true construction of the charter, it was competent to the corporation to elect the jurats from the inhabitants of the borough or from the burgesses, and, therefore, that the plea was good, inasmuch as it shewed that the defendant was an inhabitant of the borough at the time when he was elected to the office of jurat.

1828.

The KING against GREEN.

borough), it was granted that the mayor, bailiffs, and burgesses by whatever name they had before been incorporated, should thereafter be a body corporate, by the name of mayor, jurats, bailiffs, and burgesses; that there should be one of the more honest and discreet burgesses *or* inhabitants called mayor, to be elected as therein mentioned, and four honest and discreet burgesses *or* inhabitants called jurats, and two other honest and discreet burgesses *or* inhabitants called bailiffs. That the jurats and bailiffs should hold their offices for life unless removed for reasonable cause, and whenever it should happen that either or any of the jurats or bailiffs for the time being should die or be removed, or withdraw from his or their office or offices, it should be lawful for the mayor and other the surviving and remaining jurats and bailiffs for the time being, or the greater part of them, (of whom the mayor should be one,) within convenient time, to nominate, elect, and appoint another or others of the burgesses *or* inhabitants of the borough for the time being to be a jurat or jurats, bailiff or bailiffs of the borough, and that he or they so elected, having taken an oath of fidelity to the king and faithfully to behave in all things touching the

1828.

The KING *against* GREET.

then took upon himself the office. There were several replications putting in issue the due election of the defendant, and concluding to the country. The seventh replication stated, that from the time of granting the charter of 2 *Car.* 1. hitherto it had been used and accustomed within the borough that every inhabitant of the borough elected to the office of jurat of the borough, before he took upon himself the office of jurat, should be sworn and admitted a burgess of the borough, and that defendant before he took upon himself the office of jurat of the borough, had not been duly admitted and sworn a burgess. The eighth replication stated, that defendant at the time of his supposed nomination, election, and appointment to be a jurat was not a burgess of the borough duly sworn and admitted. To these replications the defendant demurred. The issues in fact were tried before *Park* J., at the Summer assizes for *Kent*, 1827, when it appeared that at the assembly at which the defendant was elected, there were present the mayor, two jurats, and two bailiffs, and that they all voted for him. Upon this evidence the learned Judge directed a verdict to be entered for the defendant, and gave the relator's counsel leave to move to enter a verdict for the crown. In *Michaelmas* term a rule nisi for that purpose was granted, and on a former day in this term

Gurney, *Bolland*, and *Tomlinson* shewed cause. It cannot now be disputed that in general where by the provisions of a charter an election is to be made by an assembly composed of several definite bodies for the time being, "or the major part of them," a good elective assembly cannot be had without the presence of a majority of the entire number of each of those definite bodies,

1828.

The King against Green.

bodies, and that a majority of the existing number will not suffice. But the question here is, Whether that rule can be applied to the charter of the borough of *Queenborough*. It appears that there are a mayor, four jurats, and two bailiffs, and that vacancies in the offices of jurats and bailiffs are to be filled up by the mayor and the remaining jurats and bailiffs, or the greater part of them. Now the rule is manifestly inapplicable to this charter, for if one bailiff were to die, it would be impossible to fill up the office, for the surviving bailiff could not be considered as a majority of the two. So, also, if one bailiff misconducted himself, and it were thought proper to remove him, a legal assembly for that purpose could not be held unless he consented to be present. Again, if two vacancies in the offices of jurats should occur, which is not a very remote probability, they could never be filled up for want of the attendance of a majority of the entire number of jurats. These difficulties shew that the rule of construction adopted in other cases is inapplicable to this, and that a majority of the aggregate number of the three component parts of the elective assembly, mayor, jurats, and bailiffs is sufficient to make it a good assembly,

been treated as of great importance to the well being of corporations, the Court, therefore, will not depart from it unless there are strong grounds for so doing. One or two instances have been pointed out in which it would be impossible to apply the rule to this corporation; those certainly must be considered as exceptions, for lex neminem cogit ad vana aut impossibilia. But the exception should not be carried further than the necessity of the case requires, more especially where the entire elective assembly can never exceed six in number, for it is obvious that in such a case the charter should be so construed as to compel as large an attendance out of that number as possible. In the present case it appears that there were three existing jurats, a majority of the whole number four might therefore have attended, and for want of such attendance the election of the defendant was invalid. If it is sufficient to have a majority of the entire body of mayor, jurats, and bailiffs present, an elective assembly may be held without the presence of either of the bailiffs.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord TENTERDEN C. J. This was a motion to enter a verdict against the defendant upon an information in the nature of a quo warranto, for usurping the office of a jurat of the borough of *Queenborough*. By the constitution of that borough there are a mayor, four jurats, and two bailiffs, seven persons in all, and those integral parts compose the assembly by which jurats are to be elected. At the election of the defendant there were present the mayor, two jurats, and two bailiffs, constituting a majority of the seven, but it was objected, that

1828.

The King against Grant.

that there could not be a good elective assembly, without the presence of three jurats, so as to make a majority of that body. The objection was founded on several decided cases, but they will not be in any way affected by the judgment about to be pronounced. The language of this charter is in substance the same as of several others upon which the decisions alluded to have proceeded. It is "that whensoever it shall happen that either, or any, of the jurats or bailiffs of the borough for the time being, shall die or be removed, or withdraw from his or their office or offices, then and so often it shall be lawful for the mayor, and other the surviving and remaining jurats and bailiffs of the borough for the time being, or the greater part of them, (of whom the mayor shall be one,) within a convenient time, to nominate, elect, and appoint another, or others, of the burgesses or inhabitants of the borough for the time being, to be a jurat or jurats, bailiff or bailiffs." I have observed that this in substance very strongly resembles the language of other charters in which it has been held that the expression "the greater part of them" shall be referred to the former member of the sentence, enumerating the component parts of the corporation; as for instance, mayor, aldermen, and capital burgesses, and not to the latter part of the sentence, where "the re- [illegible] members of those definite [illegible]

1828.

The KING against GREET.

of the defendant was invalid, inasmuch as a majority of the entire number, four jurats, were not present. But in each of the cases to which I have alluded the judgment of the Court was founded on a rule of construction not strictly required by grammatical rules, for the expression "or the major part of them" might, in each of those cases, have been referred to the latter branch of the sentence, as well as the former. Perhaps, indeed, it would grammatically have been more correct to refer it to the last antecedent than to that which was more remote. But the rule was founded upon a sound and wise principle, viz., that the select body in a corporation should be compelled to fill up vacancies in its component parts as they occur, and the most convenient and certain mode of doing that, is to require at elections the presence of a majority of each of those parts. It is by no means our intention to break in upon or weaken the authority of those decisions; but if we are called upon to construe a charter to which that rule cannot be applied, without leading to an absurdity or an impossibility, as it would in this case, it is manifest that, in order to give effect to the charter, some other construction must be given to it. In the borough of *Queenborough*, if a bailiff were to die, or be amoved, or withdraw, upon the construction contended for, his place could never be supplied. If two vacancies should at one time occur in the office of jurats, the same consequence would follow. But it is said that as a majority of the jurats were in this instance remaining, they ought to have attended. To require that in the one case and not in the other, would be putting two different constructions on the very same words, which we ought not to do. It seems to me that we ought to adopt such a construction as

 will

1828.

The King against Gazey.

will give effect to the charter, and at the same time be uniform and consistent, and that such a construction will be given by holding that the election of the defendant made by the mayor, two jurats, and two bailiffs, constituting a majority of the entire number of mayor, jurats, and bailiffs, was valid. The rule for entering a verdict for the crown must therefore be discharged.

Rule discharged.

The demurrer to the replication stood in the paper for argument at the sittings in banc. after *Michaelmas* term, and upon the statement of the pleadings, the Court intimated an opinion that the question, whether the usage stated in the replication could be pleaded in explanation of the charter (*a*), was not properly raised on these pleadings, inasmuch as the charter was not set out in hæc verba, but the legal effect of it only. Leave was granted to the prosecutor to amend; but *Platt*, for the prosecutor, afterwards said, that he would not amend, and if he could not support the replication, would contend that the plea was bad.

Tomlinson in support of the demurrer. By the

uses the words burgesses or inhabitants as synonymous, then the defendant has brought himself within the charter by shewing that he is an inhabitant, the charter having declared that any person being an inhabitant or a burgess, shall be eligible to serve the office of jurat, and that being stated to be the legal effect of the charter in the plea. The replication is, that by usage no person is eligible to serve the office, unless he unite the two characters of burgess and inhabitant. It, therefore, sets up an usage to contradict or explain the charter, which in itself is free from ambiguity. *Rex* v. *Miller* (*a*) shews that the replication is bad. (He was then stopped by the Court.)

Platt contrà. Although the charter is not set out in the pleadings in hæc verba, that which is set out as the legal effect of it, shews sufficiently that in order to make a party eligible to the office of jurat, he ought to be a free burgess. Grants from the crown must be construed strictly, *Comyn's Dig.*, *Grant*, 12. But they must also receive a reasonable construction, *Webb*'s case (*b*). In *James* v. *Tallent* (*c*) the declaration was upon a bond conditioned to pay to a woman yearly, during *the joint natural lives of herself and two children*, a certain sum therein mentioned, the annuity to be applied to the maintenance and education of the children, as well as of herself; or in case of the death of the two children therein specifically named, then the same annuity was to be payable to her during her life: one of the children died during the life-time of the mother; it was held upon demurrer to the declaration that the annuity was

(*a*) *6 T. R.* 268. (*b*) 8 *Rep.* 90. (*c*) *5 B. & A.* 889.

1828.

The KING against GAZEY.

payable to her during her life at all events. In that case, although the bond was not set out in hæc verba, the Court collected the intention to be different from that which the words, taken in their literal sense, would import, for by the terms of the condition taken literally, the annuity was to be payable only during the joint lives of the woman and her two children, but the Court held it to be payable to the woman after the death of one of the children. So in this case, although the charter be not set out in hæc verba, it sufficiently appears from the legal effect of it set out in the plea, that a person eligible to the office of jurat must be a burgess and an inhabitant. *Comyn's Dig.*, *Parol*, *A.* 11. shews that the word "*or*" may be construed *and* when the intent requires it. The plea states that at the time of granting the charter, the borough was an ancient borough, and that it had consisted of *burgesses* only. It further states, that the *burgesses* of the borough were a body corporate. The grant is, that the mayor, bailiffs, and *burgesses* shall be incorporated. The jurats at that time did not exist. The inhabitants were not at that time part of the corporate body, and if that be so, there is nothing stated in the charter to make the inhabitants

named an inhabitant to be a jurat, he would ipso facto be a burgess, and if the king can in a place where there has been a corporation before, grant that an inhabitant shall be a common councilman, surely he may authorize the corporation he so creates, to select future common councilmen from the inhabitants.] In *Rex* v. *Tate* (*a*), the king, by charter, incorporated the inhabitants of the borough by the name of the mayor, bailiffs, and burgesses. The defendant, an inhabitant, claimed as a matter of right to be sworn in as a free burgess. The mayor refused to swear him in, but the recorder administered the oath to him. The Court held that the taking of the oath whereby the party claimed at the time to be a free burgess was a sufficient user of the office, and granted an information against him for usurping the office of free burgess. The Court, therefore, must have been of opinion that inhabitants had no right to be admitted free burgesses. In *Rex* v. *West Loo* (*b*), the Court held that an inchoate right of admission was not given to inhabitants by a grant that the borough should be a free borough corporate of one mayor and burgesses, being inhabitants of the town.

BAYLEY J. The legal effect of this charter, as it is pleaded, is, that on the removal of a bailiff or jurat, either the one or the other of two descriptions of persons, viz. burgesses or inhabitants, should be eligible to fill the office of bailiff or jurat. The plea shews that an inhabitant has been elected.

LITTLEDALE J. This is a very clear case. The word inhabitant is first used in the clause relating to the

(a) 4 *East*, 337. (b) 3 *B. & C.* 677. See *Rex* v. *Hereford*, 11 *Mod.* 188.

1828.

The King against Gaffey.

election of mayor. It provides that there shall be one of the more honest and discreet burgesses or inhabitants of the borough to be elected mayor. There then follow clauses which provide for the election of jurats, and of bailiffs, from the *burgesses or inhabitants*. Those words import that the jurats and bailiffs may be taken either from burgesses or inhabitants. It is insisted that the word *or* must be read *and*, and, consequently, that jurats are to be chosen out of the burgesses *and* inhabitants. If those words are synonymous, it was sufficient for the defendant to state in the plea that he was an inhabitant, for that implies burgess. But if they are not, still it appears to me that the construction contended for in support of the replication ought not to prevail; for if the intention of the crown had been that the jurats should be elected from persons being inhabitants and burgesses, the charter would have described them as burgesses inhabiting within the borough, or burgesses who were inhabitants. It is clear that it was intended that the jurats should be selected either from burgesses or from inhabitants. Such a provision is not unreasonable, nor is there any thing in the charter to shew that it was intended that the

[redacted]

1828.

The KING *against* GREET.

PARKE J. The replication is bad for the reason already stated. Then, as to the plea, it is perfectly clear that either burgesses or inhabitants may be elected jurats at once. There is nothing unreasonable in this provision, nor in the slightest degree inconsistent with other parts of the charter. We must hold, therefore, that the defendant, who was an inhabitant, was eligible at once to the superior office of jurat without passing through the inferior office of a burgess. The judgment of the Court must, therefore, be for the defendant.

Judgment for defendant.

The KING *against* The Justices of the County of BUCKINGHAM.

Saturday, June 14th.

An indictment had been preferred against a county for not repairing a bridge, at the instance of the inhabitants of a parish, and the question intended to be tried was, whether the inhabitants of the parish or of the county were liable to repair it? The Court refused to compel the inhabitants of the parish to allow the parties indicted to inspect the parish books and documents relating to the repair of the bridge.

A RULE nisi had been obtained for liberty for the defendants to inspect, and take extracts from, the books, papers, minutes, and proceedings of the prosecutors, as bridge-wardens and trustees of *Marlow Bridge*, and all other documents of them the bridge-wardens relating to the said bridge. This rule was founded on an affidavit of the clerk of the peace for the county of *Buckingham*, which stated the following facts: In *Trinity* term an information against the defendants, for not repairing *Great Marlow Bridge*, was obtained at the instance of the bridge-wardens and trustees of certain lands in the parish of *Great Marlow*, the annual rents whereof were applicable to the repairing of *Marlow Bridge*; and in order to make a good defence to the information, it was necessary to inspect the books of ac-

1828.

The KING against The Justices of BUCKINGHAM.

count, and of minutes of the proceedings of the bridge-wardens; and also to inspect all other papers and documents touching or concerning the receipt of the rents, and the management of the estates held by them the bridge-wardens for the purposes aforesaid; and also the accounts of the disbursements of such rents. The clerk of the peace had made application to the bridge-wardens' solicitor for inspection, but permission to inspect was refused. He found in his office of clerk of the peace, among the records of the county, a statement of a case, with the opinion of counsel thereon, which statement appeared to have been made with the consent of the bridge-wardens, inasmuch as it contained copious extracts from their book, called the *Bridge Book*; and from such statement it also appeared that the said bridge-wardens and trustees had been from time to time elected by, and their accounts submitted to, and allowed by, the inhabitants of *Great Marlow* in vestry assembled.

Gurney and *Bayly* shewed cause. The books and documents mentioned in the rule, are the private books of the bridge-wardens, kept for their own use or for that of the inhabitants of the parish of *Great Marlow*. The inhabitants of the county have no interest in them, [illegible] no right, therefore, to inspect them, *The* [illegible] *Crews* (a), *Cox* v. *Copping* (b). [illegible] at the

1828.

The KING *against* The Justices of BUCKINGHAM.

here the object of the application is to compel the inhabitants of the parish of *Great Marlow* to produce documents which may be given in evidence in favour of the defendants in this case, but which may be used against the inhabitants of *Marlow* on any indictment which may hereafter be found against them for not repairing the bridge. The question is, whether the inhabitants of the county or the parish be liable to repair. The case must be considered as if there were two indictments; one against the county, the other against the parish. In *Rex* v. *Holland* (*a*), which was an information against the defendant founded upon the report of a board of enquiry in *India*, the defendant applied for a rule to inspect the report, but it was refused.

Maltby contrà. In *Harrison* v. *Williams* (*b*), which was an action against the defendant for the breach of a bye-law, restraining persons from exercising trades within the limits of a corporate city unless they became freemen, the Court compelled the corporation to allow the defendant to inspect their books although he was not a member of the corporation, but a mere resiant within the city. The bridge-wardens may be considered trustees for the public, who are entitled to use the bridge, and have an interest that it should be repaired; and the inhabitants of the county are directly interested, because they are primâ facie bound to repair it. Now *Pickering* v. *Noyes* (*c*), shews that trustees for others, or for others jointly with them-

(*a*) 4 *T. R.* 691.
(*b*) 3 *B. & C.* 162.
(*c*) 1 *B. & C.* 262.

selves,

1828.

The KING *against* The Justices of BUCKINGHAM.

selves, are compellable to allow inspection of their books. But the books in question are not of a private nature; they are open to the inspection of all the parishioners in vestry. In *Allan* v. *Tap* (*a*), the rule to inspect books was refused, because the question concerned a private right, but here a public right is concerned. In an action against a sworn broker of the city of *London* for negligence in making a contract, the Court compelled him to produce his books, on the ground that he was a public agent, *Browning* v. *Aylwin* (*b*). It is true that the Court will not, in a criminal prosecution, compel the party accused to produce evidence against himself, but the inhabitants of the parish of *Great Marlow* are not indicted. The application in this case is made not on behalf of the prosecutor, but on the behalf of the party accused. Besides, although the proceeding be criminal in point of form, it concerns a civil right, and it is the only remedy provided by the law for the breach of such a right.

Lord TENTERDEN C. J. The question at the trial of the information in this case will be, Whether the inhabitants of the county or the inhabitants of the parish of *Great Marlow* are liable to repair the bridge. The defendants will say that the inhabitants of the parish are liable. The question, therefore, will be the same as if the inhabitants of the parish had been indicted. Now it is clearly established by the authorities, that if the application were made on behalf of the prosecutor in an indictment against the parish to inspect the books of

(*a*) 2 *Blac. Rep.* 850. (*b*) 7 *B. & C.* 204.

the

1828.

The KING *against* The Justices of BUCKINGHAM.

the latter, the Court would not compel the latter to furnish evidence to make a case against themselves; and as the effect of granting the application in a case like the present may be to compel the parish to furnish evidence which may hereafter be used against them on an indictment preferred against them, I think we ought not (considering this as a contest between the county and the parish) to compel the parish to produce the documents in question: and if we ought not to compel the inhabitants of the parish to produce these documents, ought we to compel the bridge-wardens who are trustees for the parish? It has been said that it may be a question whether the bridge-wardens are trustees for the county or for the parish. Upon the affidavits there is every reason to suppose that they are trustees for the parish. They are identified with the parish. They are elected by, and their accounts are submitted to, the parishioners in vestry assembled. As we could not compel the parish to produce evidence against themselves, I think we ought not to compel the bridge-wardens to do so, they appearing to be trustees for the parish.

BAYLEY J. In order to entitle a party to inspect books, they must either be public books, or the party who applies for such inspection must have an interest in them. In the case of corporation books, no person wholly unconnected with the corporation has a right to inspect them. This is a public prosecution, and the application is made on behalf of the defendants. If all the subjects of the realm have an interest in the books and documents, the application ought to be granted.

But

1828.

The KING *against* The Justices of BUCKINGHAM.

But these books are kept not for the benefit of all the subjects of the realm, or even of the inhabitants of the county of *Buckingham*, but for the benefit and on the behalf of the inhabitants of the parish of *Great Marlow*. They are, properly speaking, not public but parochial books. This, therefore, is an application by one litigant party to compel the other to produce his own private books to make out a case against him. This is indeed a proceeding against those who apply for the inspection, but if they obtain inspection of the parish books, they may hereafter institute a criminal proceeding against the parish of *Great Marlow*, and use the extracts from their own private books as evidenceagainst them.

HOLROYD and LITTLEDALE Js. concurred.

Rule discharged.

Saturday, June 14th.

The KING *against* The Justices of WILTS.

The 17 *G.* 2. *c.* 38. *s.* 4. does not make it imperative on the justices to hear and determine an appeal at the sessions next following the publication of the rate, but they may adjourn it to the next sessions. Where a rate was published on the 16th of *September*, and the appeal was entered at the *Michaelmas* sessions, but the defendant did not give notice of his intention to try his appeal at those sessions, and the justices adjourned it as a matter of course to the *Epiphany* sessions, according to the usual practice, and the appellant gave notice of his intention to try his appeal at the *Epiphany* sessions, when the justices refused to hear it, on the ground that it ought to have been heard and determined at the preceding sessions, this Court granted a mandamus to compel them to hear the appeal.

A RATE for the relief of the poor of the parish of *Laycock*, in the county of *Wilts*, was published on the 16th *September* 1827. The quarter sessions were held on the 16th *October*, at *Marlborough*, which is sixteen miles from the parish of *Laycock*. The appellant gave no notice of his intention to try his appeal before

the

1828.

The KING against The Justices of WILTS.

the *Michaelmas* sessions, but at that sessions the appeal was entered and adjourned as a matter of course. It appeared upon affidavits that it was the usual practice for the court of quarter sessions for the county of *Wilts*, in appeals against rates, to enter the appeal at the sessions next following the making and publication of the rate, and to adjourn it to the next sessions as a matter of course. Before the *Epiphany* sessions the appellant gave notice of his intention to try his appeal. At the *Epiphany* sessions the respondents put in the rate made on the 16th *September*, and then objected that the appeal not having been heard at the previous *Michaelmas* sessions, nor having been adjourned on proof of want of reasonable notice to the respondents, or of its being impracticable for the appellant to proceed, the justices then assembled had no jurisdiction. The justices at sessions were of that opinion, and refused to hear the appeal. A rule nisi for a mandamus commanding the defendants to enter continuances to the next sessions, and hear the appeal, having been obtained,

Bingham now shewed cause. An appeal against a poor-rate might, under the 43 *Eliz. c.* 2. *s.* 6., have been made to any sessions subsequent to the publication of it. The statute 17 *G.* 2. *c.* 38. *s.* 4. was passed to remedy that inconvenience. By that statute it is enacted, "that it shall be lawful for any persons finding themselves aggrieved by any rate made for the relief of the poor, *upon giving reasonable notice to the churchwardens* and overseers of the poor of the parish, &c., to appeal to the *next* general quarter sessions of the peace for

1828.

The King against The Justices of Wilts.

for the county, riding, division, corporation, or franchise where such parish, &c. lies; and the justices of the peace *there* assembled are hereby authorized and required to receive such appeal, and to hear and finally determine the same, but if it shall appear to the said justices that reasonable notice was not given, then they shall adjourn the said appeal to the next quarter sessions, and then and there finally hear and determine the same." First, where it is practicable to appeal to the next sessions, it is imperative on the party to appeal to the next sessions. The intention of the legislature was clearly to confine the appeal to the next sessions, meaning by the next sessions, the next practicable sessions at which an appeal might be lodged, *Rex* v. *The Justices of Worcestershire* (*a*), *Rex* v. *The Justices of Dorsetshire* (*b*). Secondly, where it is practicable to give notice, it is imperative on the parties to do so before the next sessions. The act confines the appellant to the next sessions to which it is practicable for him to give notice, and does not give him an option of appealing to the next sessions but one. But as he is only entitled to appeal to the next sessions, upon giving reasonable notice, it must be imperative on him to do so where it is practicable, otherwise, instead

1828.

The KING *against* The Justices of WILTS.

there assembled, and those justices only, have jurisdiction to hear and determine the appeal. The justices at the ensuing sessions are generally a different set of persons. The anxiety of the legislature that the appeal against a rate should be determined at the sessions when it is entered, gives the true construction to the words "upon giving reasonable notice." It would be useless to command an appeal to the next sessions, and a decision at those sessions, if it were not imperative on the party appealing to give reasonable notice when practicable. The object of the legislature evidently was to prevent the confusion and inconvenience which would result from a parish being without a rate for more than three months, or from a rate being set aside at the end of six months. This anxiety is also shewn by the legislature not allowing an adjournment in every case, but only in the event of its appearing that reasonable notice was not given. The same anxiety is not shewn in the acts giving appeal against orders of removal, nor is there the same reason for a speedy decision, the costs of maintenance being easily computed. The statute 13 & 14 *Car.* 2. *c.* 12. *s.* 2. requires the sessions to do justice according to the merits of the cause. Here the facts shew beyond doubt that it was practicable for the appellant to have given notice for the *Michaelmas* sessions. The appellant ought to have shewn that it was impracticable for him to give notice in order to raise a jurisdiction in the sessions to adjourn. *Rex* v. *The Justices of Shropshire* (a), and *Rex* v. *The Justices of Wilts* (b), may be relied upon by the other side; but

(a) 7 *East*, 549. (b) 10 *East*, 405.

those

1828.

The King against The Justices of Wilts.

those were cases of appeals against orders of removal, and do not apply.

Scarlett and *Wyburn* contrà. The 9 *G.* 1. *c.* 7. *s.* 8. enables the justices upon appeals against orders of removal to adjourn. The words are, "that if it shall appear to them that reasonable notice was not given, then they shall adjourn the appeal to the next quarter sessions, and then and there finally determine the same." Now it has been decided, that though that statute is imperative upon the justices to adjourn the appeal only where reasonable notice has not been given, it leaves to them a discretion to adjourn in other cases, *Rex* v. *The Justices of Shropshire* (*a*), *Rex* v. *The Justices of Buckinghamshire* (*b*), and *Rex* v. *The Justices of Wilts* (*c*).

Lord Tenterden C. J. I think that the sound construction of the act of parliament is, that the justices are to receive an appeal against a rate at the next sessions after publishing the same, and that they are then to exercise a discretion whether they will hear and determine it at that sessions, or respite it to the next. It is impossible to say that the matter must at

1828.

The KING *against* The Justices of WILTS.

sence of a material witness. Here it appears that the practice of the sessions has been to allow appellants to enter their appeals at the sessions next following the publication of the rate, and to adjourn the hearing to the second sessions as a matter of course. That being the general practice, I think that the appellant in this case, who acted on the faith that such practice would be adhered to, ought not to be deprived of his right of appeal, and therefore that the rule for a mandamus ought to be made absolute. At the same time I think it would be more beneficial to the public, and more consistent with the intention of the legislature, if the justices did not adjourn appeals against rates as a matter of course. I think they should endeavour to induce parties to try their appeal at the next practicable sessions after the publishing of the rate.

BAYLEY J. I am of the same opinion. It was competent for the justices at the first sessions after the publishing of the rate, to refuse to receive the appeal unless there was proof that notice of appeal had been given; but they did receive the appeal. Having received it, it was then competent to them in their discretion to adjourn it, and they did adjourn it. I think the appeal ought to have been heard at the next sessions after that adjournment.

Rule absolute.

1828.

Tuesday, June 17th.

HAYWARD and Others *against* WRIGHT.

Where a cause has been sent back by procedendo to an inferior court, this Court will not quash the writ on the ground that the cause is important, and fit to be tried in the superior court.

THIS was an action commenced in the Palace Court, and removed into this Court by habeas corpus. The defendant did not justify bail in due time, and a procedendo issued.

Parke afterwards obtained a rule nisi for quashing the procedendo, on an affidavit stating that the cause was of importance, and fit to be tried in this Court.

Thesiger shewed cause, and relied on the stat. 21 *Jac.* 1. *c.* 23. *s.* 3., which enacted that no cause should be again removed which had been once sent back by procedendo to an inferior court.

Lord TENTERDEN C. J. We cannot make this rule absolute. There is a regular fixed course by which a party may remove his cause from an inferior court. The defendant in this instance neglected to do that which

1828.

Tuesday, June 17th.

FIRTH *against* THRUSH.

The indorsee of a bill of exchange, dishonoured by the acceptor, being ignorant of the place of residence of one of the indorsers, employed an attorney to give notice to him and the other prior indorsers; the attorney, after enquiry, having received information of this indorser's place of residence on the following day, consulted his client, and on the third day sent notice of the dishonour of the bill: Held, that the notice was sufficient.

The declaration averred that the defendant had notice of the dishonour: Held, that that allegation was satisfied by proof, that he had notice as soon as it could reasonably be given, and that it was unnecessary, therefore, to state in the declaration the special circumstances which rendered valid the notice given at a later period than in ordinary cases would be sufficient.

DECLARATION by the plaintiff, as indorsee, against the defendant as indorser of a bill of exchange. The declaration was in the usual form, and alleged non-payment of the bill by the acceptor, of which the defendant had notice. Plea, general issue. At the trial before Lord *Tenterden* C. J., at the *London* sittings after last *Michaelmas* term, it appeared that the action was brought to recover the amount of the following bill of exchange:

"*Frome, October* 1st, 1825.

"Ten months after date pay to my order two hundred and fifty pounds, for value received.

"RICHARD MAJOR.

"Mr. *S. Greenland*,
"Clothier,
"*Frome*."

The bill was accepted, payable at Sir *Peter Pole*'s banking-house in *London*, was indorsed by *Major* to the defendant, by the latter again indorsed to *Major*, and by *Major* to *Swain* and Co., of *London*, and by them to the present plaintiff. *Major*, the drawer of the bill, resided in *Somersetshire*, and was the brother-in-law of the defendant, and, by the authority of the latter, had put his name on the bill. Before the bill became due, the plaintiff had applied to *Swain* and Co. for information respecting the defendant, but they could give him no information. He, as well as *Swain* and Co., re-

1828.

FIRTH against THRUSH.

peatedly applied to *Major*, and also to *Miller*, his attorney (who acted in this suit as the attorney for the defendant). They returned for answer, that the plaintiff must not expect to get any thing from *Thrush*, and they gave no information respecting his place of residence. The bill was dishonoured by *Greenland*, the acceptor, on the 4th *August* 1826, the day it became due. The plaintiff then delivered the bill to *Pownal*, his attorney, and directed him to give notice to the parties on the bill, and due notice of such dishonour was given to *Swain* and Co., and to *Major*; and on the 5th *August* a letter containing notice of the dishonour of the bill was put into the post-office in *London*, addressed to the defendant at *Frome*. He in fact did not reside at *Frome*, but at *Burton*, which is ten miles from *Frome*, and never received the letter, and it was returned through the post-office to the plaintiff, on the 24th *September*. He then directed *Pownal* to use the utmost diligence to ascertain the place of residence of the defendant, and the latter wrote to a professional man at *Frome* to use his endeavours for the same purpose; and, on the 16th *October*, he, *Pownal*, received information, by letter, that the defendant resided at *Burton*. On

1828.

FIRTH against THRUSH.

actually given was not valid; for admitting that the facts proved shewed that the plaintiff had used due diligence to ascertain the place of residence of the defendant in the first instance, still the plaintiff's attorney having acquired knowledge of the defendant's residence on the 16th *October*, ought to have given notice on the 17th: whereas he neglected to do so until the 18th. Lord *Tenterden* was inclined to be of opinion that as *Major* was the agent of *Thrush* for the purpose of indorsing the bill, he might be considered his agent for the purpose of receiving notice, and, therefore, that notice to *Major* was notice to *Thrush;* but even if that was not so, that under the peculiar circumstances of this case, the notice on the 18th was sufficient; and as to the other point, he was of opinion that if the evidence shewed that the defendant had notice as soon as it was required by law, the averment was proved; but reserved the points, and directed the jury to find a verdict for the plaintiff for the amount of the bill, with liberty to the defendant to move to enter a nonsuit. A rule nisi for that purpose having been obtained in last term,

Sir *J. Scarlett* and *Barnewall* now shewed cause. There was sufficient notice of the dishonour of the bill. *Major* was the agent of *Thrush*, authorized to indorse the bill. He may fairly, therefore, be considered his agent for the purpose of receiving notice of the dishonour, and notice to *Major* was notice to the defendant. But assuming that to be otherwise, still, under the special circumstances of the case, the notice given to the defendant on the 18th of *October* was reasonable. The plaintiff was ignorant of the place of residence of the defendant. Before the bill became due

1828.

FIRTH against THRUSH.

he had made inquiries of *Major*, and of *Miller*, his attorney, and could not gain any information on the subject. He used due diligence to ascertain the place of residence of the defendant. When the bill became due and was dishonoured, the plaintiff's attorney in due time addressed a letter to the defendant, on the supposition that he resided at *Frome*, where *Major* resided, and where the bill purported to have been drawn. The defendant did not reside at *Frome*. There can be no doubt that the plaintiff used due diligence before the 24th of *September*. Then the only question is, Whether there were any laches after the letter, containing the notice was returned to the plaintiff? He immediately directed his attorney to make enquiries respecting the defendant's place of residence, and the attorney wrote to another professional man, residing at *Frome*, to make enquiries on the same subject. The plaintiff's attorney, on the 16th *October*, received information that the defendant resided at *Burton*. He was not bound to neglect all other business on that day in order to give notice, and on the 18th he gave notice to the defendant. As to the other point, the allegation that notice was given to the defendant, was satisfied by proof that notice

excused the want of notice at the usual time, *Cory* v. *Scott* (*a*). Then as to the other point, the notice of dishonour was not sufficient. Assuming that the evidence shewed that the plaintiff, before and after the bill became due, used due diligence to discover the place of residence of the defendant, still he did not give notice to the defendant within a reasonable time after he acquired such knowledge. The plaintiff's attorney was informed of the defendant's place of residence on the 16th. He ought to have given notice on the 17th, but it was not in fact sent till the 18th. The plaintiff, therefore, was guilty of laches.

Lord TENTERDEN C. J. I cannot entertain any doubt that the allegation in the declaration, that the defendant had notice of the dishonour of the bill was fully proved, by shewing that he had a notice good and available in law. It was quite unnecessary to state on the record the special circumstances or facts which rendered the notice valid, although it was given at a later period than would in ordinary cases have sufficed. Then all difficulty as to the form of the declaration being removed, the only remaining question is, Whether the notice of dishonour was good and valid. It struck me at the trial, that as *Major* was the agent of the defendant for the purpose of indorsing the bill, he was also his agent for the purpose of receiving notice of dishonour, and that notice having been given to him in due time, that was notice to the defendant. I still incline to be of that opinion. But it is unnecessary to decide the case upon that ground. I would rather decide it on more

(*a*) 5 *B.* & *A.* 619.

1828.

FIRTH against THRUSH.

general principles. For a month or more there was no knowledge of the defendant's abode. It was clear that the holder of the bill was not guilty of any laches before the 24th of *September*. He had made enquiries of *Major* and of his attorney as to the defendant's residence, and they would not give him any information. The plaintiff sent notice of dishonour to *Frome*, which was the place where the bill purported to have been drawn. That letter was returned to *Pownal* on the 24th of *September*, and he thereupon wrote to an attorney at *Poole*, and requested him to ascertain the place of residence of the defendant. On the 16th of *October* he received information of the defendant's residence. If he had written to the defendant on the 17th, there would not have been any doubt that the notice would have been sufficient; but he did not write till the 18th. the question is, Whether he was entitled to take a day to consult his client? *Pownal* was not the holder, he was the agent and attorney of the plaintiff, employed by the latter to give notice of the dishonour. If *Pownal*, the agent of the plaintiff for the purpose of giving notice of dishonour, had a right to take a day to consult his client under the special circumstances of the case, the notice was sufficient. I think he had. If

BAYLEY J. I am of the same opinion. The allegation that the defendant had notice was proved by shewing that he had notice as soon as it could reasonably be given. The duty of the holder of a bill is to use due diligence to discover the residence of parties entitled to notice. Here the holder attempted before the bill became due to ascertain from the drawer the place of the defendant's residence, and the drawer would not give the information. It was unnecessary when the bill became due to renew the same attempt, and the plaintiff sent notice to the place where he might reasonably suppose the defendant to reside. On the 16th of *October Pownal* received notice that the defendant resided at *Burton*. *Pownal* was entitled to go to his client and consult him. He has one day for that purpose, and goes on the 17th of *October*. *Pownal* had the same period of time as the party himself. There is a class of cases analogous to this: I mean those cases where bills are deposited in the hands of a banker for the benefit of a customer. The banker has a day to give notice to his customer. If the holder of a bill place it in the hands of his banker, the latter is only bound to give notice of its dishonour to his customer in like manner as if he were himself the holder, and his customer must send to the party next entitled to notice; and the customer has the like time to communicate such notice as if he had received it from a holder (*a*).

HOLROYD J. The law requires reasonable notice. The facts proved in this case shew that reasonable notice was given. This is exactly like the case of a bill

(*a*) See *Haynes* v. *Birks*, 3 *Bos. & Pul.* 599. *Scott* v. *Lifford*, 9 *East*, 547. *Langdale* v. *Trimmer*, 15 *East*, 291.

deposited

1828.

FIRTH against THRUSS.

deposited by a customer with his banker. If the bill in question had been deposited by the plaintiff with his banker, and dishonoured on the 16th, it would have been sufficient for the banker to have given the plaintiff notice on the 17th, and for the plaintiff to have given notice to the defendant on the 18th. I am, therefore, of opinion that the notice given in this case was sufficient. I think also that the form of declaration is proper, and that the allegation that the defendant had notice, was satisfied by proof that he had that reasonable notice which the law requires.

LITTLEDALE J. I think that the notice was sufficient for the reasons already given by the rest of the Court. I also think that the averment in the declaration was proved. In *Bateman* v. *Joseph* (*a*), which was an action by the indorsee against the payee and first indorser of a bill of exchange, it appeared that the plaintiff received notice of the dishonour on the 30th of *September*, in time to have given notice on that day; he gave no notice till the 4th of *October*, but his clerk proved that he did not know the defendant's residence till that day. Lord *Ellenborough* there said "the holder

1828.

FIRTH *against* THRUSH.

there can be no doubt that due diligence was used in that respect. If the notice, under the peculiar circumstances of the case, was a valid notice at the time it was given, the allegation is satisfied by the proof. I do not recollect to have ever seen the special circumstances which excuse the want of notice at the time when it is usually required, stated in a declaration. The legal effect of such special circumstances is to make a notice on the 18th of *October* a good and valid notice. It is sufficient in pleading to state the legal effect. The rule for entering a nonsuit must, therefore, be discharged.

Rule discharged (*a*).

(*a*) See *Baldwin* v. *Richardson*, 1 *B.* & *C.* 245.

FAIRLIE *against* DENTON and BARKER.

Tuesday, June 17th.

The general rule of law is, that a debt cannot be assigned. The exception to that rule is, that where there is a defined and ascertained debt due from *A.* to *B*, and a debt to the same or a larger amount due from *C.* to *A.*, and the three agree that *C.* shall be *B.*'s debtor instead of *A*, and *C.* promises to pay *B.*, the latter may maintain an action against *C.* But in such action, it is incumbent on the plaintiff to shew, that at the time when *C.* promised to pay *B.* there was an ascertained debt due from *A.* to *B.*

ASSUMPSIT for money had and received. Plea, non assumpsit. At the trial before Lord *Tenterden* C. J., at the *London* sittings after *Hilary* term 1828, the following appeared to be the facts of the case. By articles of agreement, the defendants and one *E. Perry* agreed to grant a piece of land therein described, unto *S. Crossland* and *J. Stonehouse*, who agreed to build on the same land twelve brick messuages or dwelling-houses. The defendants and *Perry* agreed to purchase from *Crossland* and *Stonehouse* a yearly rent-charge of 96*l.* to be charged upon the said messuages, at and for the sum of 1200*l.*, which said sum of 1200*l.* was to be paid to *Crossland* and *Stonehouse*, or to their order in writing, by six instalments, at specified stages in the progress of the

buildings.

1828.

FAIRLIE against DENTON.

buildings. The 5th instalment was 180*l.*, and was to be paid as soon as the plasterers' work should be finished. The 6th and last instalment was 240*l.*, and was to become due when each of the twelve messuages should be painted, papered, and coloured, iron rails and iron work fixed, and in all respects completely fit for the reception of a tenant.

The defendants from time to time made payments on account of the 1200*l.* to *Crossland* and *Stonehouse*, and the latter at different times gave to the plaintiff eight orders in writing on the defendants, for several sums of money, amounting in the aggregate to 499*l.* 10*s.* The defendants paid the sums mentioned in the first five orders only. *Crossland* being called as a witness, stated, that he kept a book in which he entered all monies received by him of the defendants, and he entered as cash payments made by them, the amount of the several orders given by him and *Stonehouse* in favour of the plaintiff; and he further stated, that the defendants kept a book, in which there were entries corresponding in all respects with his own, the two accounts having been frequently checked and compared with each other. The defendants' book having been produced, it appeared

in the defendants' hands orders of *Crossland* and *Stonehouse* to the amount of 233*l.* They refused to advance *Crossland* and *Stonehouse* any further sum, alleging as a reason for their refusal, that there was upwards of 200*l.* due to the plaintiff on the orders lodged with them, for which they, the defendants, were responsible. The plaintiff gave no evidence to shew that at the time when this conversation took place, the buildings were in such a state of forwardness as to entitle *Crossland* and *Stonehouse* to a larger sum than that which had already been advanced to them by the defendants; and it afterwards appeared, in the course of the defendants' evidence, that the buildings were not only not completed on the 5th of *February*, but it was at least doubtful whether the plasterers' work had been done so as to entitle *Crossland* and *Stonehouse* to the fifth instalment. The defendants afterwards paid to *Crossland* and *Stonehouse* the further sum of 95*l.*, which, together with the sums paid by them, and the sum of 233*l.*, which the plaintiff claimed to be paid to them in pursuance of their orders, would make up the full sum of 1200*l.* which was to become due to *Crossland* and *Stonehouse* when the buildings should be completed.

Upon these facts, it was contended, on the part of the defendants, that the plaintiff could not recover, because he claimed as assignee of a debt which by law could not be assigned. If by an agreement between the three parties, the plaintiff had undertaken to look to the defendants and not to his original debtors, that would have been binding, and the plaintiff might have maintained an action on the agreement; but in order to give him that right of action, there ought to have been an extinguishment of the original debt, which would have

been

1828.

FAIRLIE against DENTON.

been a good consideration for the defendants' promise. *Wharton* v. *Walker* (*a*). Here the plaintiff never agreed to discharge or release the debt owing to him by *Crossland* and *Stonehouse*, and he may sue them at any time. Secondly, assuming that the original debt was extinguished, this action for money had and received is not maintainable, because the defendants never in fact received any money on account of the plaintiff. Lord *Tenterden* directed the jury to find a verdict for the plaintiff, if from the evidence they thought that the defendants had ever acknowledged that they held in their hands money for the plaintiff; but he reserved liberty to the defendants to move to enter a nonsuit, if the verdict should be against them. A verdict having been found for the plaintiff, a rule *nisi* for entering a nonsuit was obtained by Sir *James Scarlett* in last *Easter* term.

F. Pollock and *R. V. Richards* now shewed cause. If the defendants agreed to consider the money due to *Crossland* and *Stonehouse* in respect of the building contract, as money had and received by them, the defendants, on account of the plaintiff, they are liable in this action. The legal effect of such an agreement would be

1828.

FAIRLIE against DENTON.

clerk of the defendants met together, and *Temprell* drew a check on the defendants in favour of *Lynch* for 1690*l.* The defendants' clerk received the check, and gave *Lynch* a draft on the defendants for 415*l.*, being the difference between 1690*l.* and 1275*l.* the sum due from *Lynch* to the defendants. *Lynch* had committed an act of bankruptcy before this transaction took place, and notice was given to the defendants not to pay the draft to *Lynch*; but they did so. *Spratt*, *Lynch*'s assignee, sued for the amount as money had and received to his use, and *Best* C. J. directed the jury to find for the plaintiff if they thought the transaction between *Temprell* and the defendants' clerk was equivalent to a passing of the money. The jury having found for the plaintiff, it was held, after argument on a rule nisi for a new trial, that the assignee of *Lynch* might maintain an action against the defendants for money had and received. But then it is said the present plaintiff cannot sue, because he can only claim as assignee of *Crossland* and *Stonehouse*, and that a chose in action cannot be assigned. That is undoubtedly the general rule. But *Curon* v. *Chadley* (*a*), and *Wharton* v. *Walker* (*b*), establish beyond all doubt that if it had been agreed in this case between the plaintiff, *Crossland* and *Stonehouse*, and the defendants, that the latter should become the debtors of the plaintiff for the 233*l.* (which was the sum owing by *Crossland* and *Stonehouse* to him), the debt due from *Crossland* and *Stonehouse* to the plaintiff would have been extinguished, and the plaintiff would be entitled to sue the defendants for that sum. Now there was evidence in this case to go to the jury, that there was such an agreement, and that the plaintiff was a party to it. The plaintiff having lodged the order

(*a*) 3 *B.* & *C.* 591. (*b*) 4 *B.* & *C.* 163.

for

1828.

FAIRLIE against DENTON.

for payment with the defendants, may have agreed with them to look to them as his debtors for the amount mentioned in those orders, and the fact of their having represented to *Crossland* that they (the defendants) were responsible to the plaintiff for the amount of those orders was evidence to go to the jury that they had promised the plaintiff to pay him the sums owing to him by *Crossland* and *Stonehouse*, and that the plaintiff had agreed to take the defendants as his debtors; and if that be so, it is quite clear that the debt owing by *Crossland* and *Stonehouse* was extinguished, and the extinguishment of that debt is a good consideration for the defendants' promise. Besides, here *Crossland* and *Stonehouse* could not revoke the order, after the defendants acknowledged that they were responsible to the plaintiffs, *Hodgson* v. *Anderson* (*a*).

Sir *J. Scarlett* and *Comyn* contrà were stopped by the Court.

Lord TENTERDEN C. J. It is a general rule of law, that a chose in action cannot be assigned. There is, however, an exception to that rule. It has been

1828.

FAIRLIE *against* DENTON.

to *Crossland* and *Stonehouse*. *Crossland* then asked the defendants for a further advance, which they refused, because they held orders in favour of the plaintiff for payment of more than 200*l*. But non constat that that sum was then due from them to *Crossland* and *Stonehouse*. It might afterwards have been to become due in the progress of the work, which was not at that time completed. It lay upon the plaintiff, in order to bring himself within the cases which form exceptions to the general rule, to shew that at the time when the defendants are supposed to have promised to pay him the debt owing to him by *Crossland* and *Stonehouse* there was a debt ascertained to be due to them from the defendants. Not having done so, he has not brought himself within the exception to the general rule, and, therefore, the rule for a nonsuit must be made absolute.

Rule absolute.

1828.

Wednesday, June 18th.

BIGGS and Others, Assignees of COLLIER, a Bankrupt, *against* FELLOWS, surviving Partner of TATLOCK.

In *August* 1821, *A.*, a trader, being indebted to *B.* and *C.*, then in partnership, but about to separate, gave a warrant of attorney to secure payment by instalments to *B.* alone, who knew that *A.* was then insolvent. In *October*, *A.* committed an act of bankruptcy; and in *November*, at *B.*'s desire, he sent goods to the warehouse of *B* and *C.* as a further security for the debt. In *December*, *B.* and *C.* dissolved

ASSUMPSIT for money had and received by the defendant and *Tatlock* in his lifetime, to the use of the plaintiffs as assignees of *Collier*. Plea, the general issue. At the trial before Lord *Tenterden* C. J. at the *London* sittings after *Michaelmas* term 1827, it appeared that in *May* 1821, the bankrupt dishonoured a bill for 321*l.* which he had accepted for the accommodation of *Whitton* and Co., and which they had indorsed to the defendant and *Tatlock*, who then carried on business in copartnership. *Tatlock* pressed *Collier* for payment, and not being able to obtain it, demanded security, and on the 4th of *August* 1821, *Collier* consented to give a warrant of attorney to secure payment by instalments; and this security was given to *Tatlock* alone, because at that time a dissolution of the partnership between him and the defendant was contemplated, and which was

1828.

BIGGS *against* FELLOWS.

to a considerable amount to the warehouse of *Fellows* and *Tatlock*, which remained there at the time of the dissolution of partnership between them. In *February* and *March* 1822, *Tatlock* received from *Collier*, on account of the debt secured by the warrant of attorney, 110*l.*, and, in *Michaelmas* term 1822, he entered up judgment, and issued a fieri facias thereon, against *Collier's* goods, under which he received a further sum of 44*l.* A commission of bankrupt issued against *Collier* on the 7th *January* 1823, under which the plaintiffs were chosen assignees. *Tatlock* died in *November* 1823. For the defendant it was contended, that these payments being received by *Tatlock* under the warrant of attorney which was given to him alone, were not payments to the defendant, and that the action should have been brought, not against him, but against the personal representative of *Tatlock*. Lord *Tenterden* thought the plaintiffs were entitled to recover the two sums of 110*l.* and 44*l.*, and directed the jury to find a verdict accordingly, but gave the defendant leave to move to enter a nonsuit. A rule nisi for that purpose was obtained in *Hilary* term, against which,

Sir *J. Scarlett* and *Richards* shewed cause. There is no doubt that the debt was originally due from *Collier* to *Fellows* and *Tatlock*, and it was decided yesterday, in *Fairlie* v. *Denton*, that a debt cannot be assigned. It does not appear that any new arrangement was made by all the three parties. Suppose, however, the warrant of attorney was given to *Tatlock* alone, because the partnership was about to be dissolved, and he was to pay and receive all monies on account of the concern, still it was to secure a partnership debt, and any payment on

1828.

Biggs against Fellows.

that security to him would be on account of both, and to the credit of both.

Denman and *Alderson* contrà. The plaintiffs in this action seek to charge the defendant with money improperly received by *Tatlock*, after they had dissolved partnership. He received it on a security given to himself alone, although for a debt originally due to both; and it does not appear that this was done by the authority or consent of the defendant. In *Kilgour* v. *Finlyson*, and others (*a*), it appeared that *Finlyson*, after having dissolved partnership with his co-defendants, indorsed a bill in the names of the firm, got it discounted by the plaintiff, and applied the proceeds in discharge of a debt due from the partnership, and yet it was held, that the plaintiff could not recover against the other parties, because it did not appear that *Finlyson* was authorized by them to raise the money and apply it in that manner. Here *Tatlock* was not authorized by the defendant to receive the money in question, and there was no proof of the manner in which he applied it.

Lord Tenterden C. J. I am of opinion that this

1828.

BIGGS against FELLOWS.

The partnership, however, was not dissolved until the last day of that year, and if an action had been commenced by both partners to recover the debt immediately after the warrant of attorney was given, there can be no doubt that they might have recovered. In the month of *October*, *Collier* committed an act of bankruptcy; after that, and after the dissolution of partnership, the money in question was paid to *Tatlock*. The terms upon which the dissolution took place were not in evidence, but if they contained any stipulation that could have had the effect of exonerating the defendant from his liability, that should have been shewn by him. In the absence of any such proof, I think that payment to one was in law payment to both, and that the money received after the act of bankruptcy may be recovered from the defendant.

BAYLEY J. The money was paid in respect of a debt due to the partnership; both the partners were, therefore, primâ facie liable to refund it to the assignees of the bankrupt. If there had been a bargain between *Tatlock* and the defendant, which made it the receipt of *Tatlock* alone, that should have been proved by the defendant. The warrant of attorney was not, of itself, sufficient to make that out in the absence of any evidence that *Tatlock* was to retain the money to his own use.

HOLROYD J. A judgment taken by one of two joint creditors, does not extinguish the debt, unless it be clearly taken with the concurrence of both. The debt, therefore, in the present case, remained due to the defendant jointly with *Tatlock*, notwithstanding the warrant of attorney.

1828.

Biggs against Fellows.

LITTLEDALE J. concurred.

Rule discharged.

There was also an action of trover between the same parties, brought to recover the value of the goods deposited by *Collier* with *Tatlock* and the defendant, as mentioned in the former case, and sold by *Tatlock* after the dissolution of partnership. In this case also, a rule for entering a nonsuit had been granted, and, after the former case had been disposed of,

Denman was called upon to support his rule; and he contended that the sale by *Tatlock*, after the dissolution, was a wrongful act, for which he alone and not the defendant was responsible.

Lord TENTERDEN C. J. The goods were originally deposited with *Tatlock* and the defendant, and they continued to be identified with respect to those goods from that time down to the time of the sale. The plaintiffs, therefore, are entitled to retain the verdict.

Rule discharged.

[redacted]

1828.

EDMONDS *against* LOWE.

Wednesday, June 18th.

In an action by the indorsee against the drawer of a bill, it appeared by the plaintiff's case that he had received it from the acceptor in discharge of a debt due from him. For the defendant, it was stated that the bill was accepted in discharge of part of a debt due from the acceptor to the drawer; that it was indorsed and delivered to the acceptor, in order that he might get it discounted, and that he delivered it to the plaintiff, upon condition, that if he procured cash for it, he might retain out of it the amount of the debt due to him from the acceptor, but that he never did get cash for the bill: Held, that the acceptor could not be examined to prove these facts; for although he was uninterested as to the amount sought to be recovered on the bill, he was interested as to the costs against which he would have to indemnify the defendant, if the plaintiff obtained a verdict.

ASSUMPSIT by the indorsee of a bill of exchange for 198*l.*, drawn by the defendant upon one *Benzeville*, and accepted by him, and indorsed by the defendant. Plea, the general issue. At the trial before Lord *Tenterden* C. J., at the *London* sittings, after last *Michaelmas* term, the plaintiff proved the acceptance, indorsement, and dishonour of the bill. On cross examination of his witness it appeared that he before held a check for 70*l.*, drawn by *Benzeville*, which had been dishonoured, and that *Benzeville* brought the bill in question, and asked the plaintiff to exchange drafts with him, which was done. For the defendant it was stated, that *Benzeville* being indebted to the defendant in the sum of 350*l.*, the bill in question was accepted by him for a part of that debt, and he offered to get it discounted. In order that he might do so, the defendant indorsed the bill, and delivered it to *Benzeville*, who carried it to the plaintiff (a bill broker), and told him, that the defendant wanted cash for it, and that *if he would procure cash for it*, he might retain out of the proceeds 70*l.*, which *Benzeville* owed him. The plaintiff took the bill upon those terms, but never got it discounted, and never gave any value for it. *Benzeville* was called as a witness to prove these facts, but was objected to on the ground of interest, and rejected,

1828.

EDMONDS against LOWE.

whereupon the plaintiff obtained a verdict. In *Hilary* term a rule nisi for a new trial was obtained; and now

Sir *J. Scarlett* and *Patteson* shewed cause. *Benzeville* was interested in the event of the cause. The plaintiff was, according to his own case, entitled to recover 70*l.* on the bill, as to that sum the acceptor was, perhaps, indifferent, but if the plaintiff recovered, he would be liable over to the defendant, not only for the amount of the verdict, but for the costs also, whereas, if the defendant succeeded, he (*Benzeville*) would only be liable to the plaintiff for the 70*l.*

Denman and *Chitty* contrà. *Benzeville*, in his negotiation with the plaintiff for the discount of this bill, acted as agent for the defendant. Now the servants of tradesmen who deliver goods, and other agents who alone have knowledge of the transactions in dispute, are constantly admitted to give evidence ex necessitate, although, strictly speaking, they are interested in the result of the action.

Lord TENTERDEN C. J. I am of opinion that the

1828.

EDMONDS *against* LOWE.

in the ordinary transactions of commerce, then they are, ex necessitate, excepted out of the rule, and admitted to give evidence, but here *Benzeville*'s only connexion with or agency for *Lowe*, arose out of the transaction in question; he was not, therefore, competent to give evidence.

The rule for a new trial was ultimately made absolute, upon reading certain affidavits put in by the defendant.

Ex parte GREGORY.

Thursday, June 19th.

BALGUY moved for leave to enter up judgment on an old warrant of attorney, given as a collateral security, together with a mortgage. The affidavit on which the motion was founded was entitled "In the King's Bench," but not in any cause.

Per Curiam. As there is not, in fact, any cause in court, the title of the affidavit is sufficient.

Motion granted.

COLE et UX. *against* ROBERT EAGLE and Others.

Thursday, June 19th.

TRESPASS for breaking and entering the dwelling house of the wife dum sola, and expelling her therefrom. The first count was framed on the stat.

The stat. 8 *H.* 6. *c.* 9. *s.* 6., which gives treble damages to the party grieved, by a forcible entry and expulsion, applies only to persons having the freehold; for the remedy is given against *the disseisor*.

8 *H.* 6.

1828.

Case against Eaton.

8 *H.* 6. *c.* 9., and stated that the wife "was possessed of the dwelling house, as tenant thereof to *T. K. Eagle*, for so long a time as they should respectively please," that defendants, with a strong hand, entered the house, and expelled her. There were other counts in trespass in the ordinary form. The defendants pleaded the general issue. At the trial a verdict was found for the plaintiffs, with 5*l.* damages, and judgment was entered up generally for that sum and treble costs, which were allowed by the Master on the ground that the plaintiffs were entitled to them under the 8 *H.* 6. *c.* 9. *s.* 6. A rule nisi for a review of the Master's taxation having been obtained,

F. Kelly shewed cause. By the stat. 8 *H.* 6. *c.* 9. *s.* 6. it was enacted, that a person put out, or disseised of any lands in a forcible manner, may have assise of novel disseisin, or a writ of trespass, and if the party recover, he shall have treble damages against the defendant. Here then the plaintiffs were entitled to treble damages, and, consequently, to treble costs, *Pilfold*'s case (*a*). It is true that judgment has been entered up for single damages only, and the plaintiffs may be considered as

costs; for they can only have treble costs as incident to treble damages. But, supposing that not to be a sufficient answer, the statute 8 *H.* 6. does not apply to this case, the wife was at most only tenant from year to year, and the statute applies only to parties forcibly dispossessed of a freehold. The words in *s.* 6. are, that "the party grieved shall have assise of novel disseisin, or a writ of trespass *against such disseisor.*" He was then stopped by the Court.

Lord TENTERDEN C. J. I think it is quite plain that the statute was intended to apply to those only who have the freehold. A disseisor is one who takes the freehold: and this is easily accounted for; at the time when the statute in question was passed no tenants at will or from year to year were known.

BAYLEY J. The case of *Rex* v. *Dormy* (*a*) shews that a party is not within the statute, unless he has the freehold.

Rule absolute (*b*).

(*a*) 1 *Ld. Raym.* 610.

(*b*) See *Fitz. N. B.* 560. 8th edit. *Dalaber* v. *Lyster*, 2 *Dyer*, 142. *Anonymous*, *Sav.* 68. pl. 141. *Anonymous*, 1 *Ventr.* 306. 3 *Bulstr.* 71. *Rex* v. *Wannop*, *Say.* 142.

1828.

Thursday, June 19th.

MAGRAVE *against* WHITE.

Where the speaker of the House of Commons certified that a certain sum was due to *A. B.*, "a witness summoned by and on behalf of *C. D.*, one of the *sitting members for Dublin*, to give evidence before an election committee," the Court ordered judgment to be entered up against *C. D.* for that sum as upon a warrant of attorney, the certificate being held conclusive as to the fact of the witness having been summoned, and the stat. 53 G. 3. c. 71. being held applicable

THIS was an action by the plaintiff against the defendant, to recover the expenses incurred by him in attending as a witness before an election committee of the House of Commons.

Starkie now moved for leave to enter up judgment for the plaintiff, upon the speaker's certificate, given in pursuance of the *53 G. 3. c.* 71. The certificate was as follows: "Whereas *T. R.* Esq., clerk-assistant to the House of Commons, and *S. C. Cox* Esq., one of the masters of the High Court of Chancery, (who were duly authorized and directed by me, according to the *53 G. 3. c.* 71., entitled, 'an act for amending and rendering more effectual the laws for the trials of controverted elections, and returns of members to serve in parliament,' to examine and tax the costs and expenses of *C. M., a witness summoned by and on behalf of* H. W., *one of the sitting members* for the county of *Dublin*, incurred

said taxed costs and expenses of the said *C. M.* do amount to the sum of 47*l.*, which sum I do hereby certify to be due and payable from and by the said *H. W.*, as such sitting member as aforesaid, to the said *C. M.* as such witness as aforesaid. And I do hereby further certify, that the fees due and payable upon such taxation do amount to 9*l.* 14*s.* 8*d.*, which last-mentioned sum (making together, &c.) I do further certify to be due and payable from and by the said *H. W.* to the said *C. M.*, the same being charged against the party at whose instance the said *C. M.* was summoned to attend the said select committee, but which sum of 9*l.* 14*s.* 8*d.* I do lastly certify, hath in the first instance been paid by the said *C. M.* in order to obtain this certificate." Signed by *Charles Manners Sutton*, speaker.

By the seventh section of the statute upon which the certificate is founded, it is enacted, That in all cases where any question shall arise as to the amount of the reasonable costs, expenses, or fees which shall be due and payable to any witness upon the trial of any such petition, the speaker shall direct them to be taxed, and give a certificate of the amount in the manner that has been pursued; and by *s.* 13. it is enacted, "That in any action which shall be commenced for the recovery of any costs, expenses, or fees which shall have been certified by the speaker, the certificate shall have the force and effect of a warrant of attorney; and the court in which the action is brought, shall, upon production of the certificate, enter up judgment for the sum therein mentioned." These two sections are general in their terms, and apply to all witnesses, whether summoned on behalf of the petitioner or the sitting member. The speaker, therefore, had, under the seventh section, power

to

1828.

Mandamus against Warren.

to grant the certificate in question, and by the thirteenth section, this Court are empowered to act upon the speaker's certificate whensoever he is authorized to grant it.

Adam and *Law* contrà. Supposing the statute 53 *G.* 3. to extend to witnesses summoned on behalf of a sitting member, still, in the present case, the Court cannot grant this motion, for there is no proof that the party applying was summoned. [Lord *Tenterden* C. J. It is stated on the face of the certificate that he was summoned.] An order for the taxation of costs under this statute, is always made by the speaker on a mere suggestion that the party was summoned. Nor has the speaker authority to inquire into the fact, or to direct an inquiry; his power under this statute is confined to cases where the amount payable is the only thing in dispute. With respect to the other question, it seems that the legislature never intended to provide this summary remedy against the sitting member. The main object of the act seems to have been, to secure the payment of costs occasioned by frivolous and vexatious petitions. The 28 *G.* 3. *c.* 52. provided for the payment, by the petitioner, of the costs incurred by the sitting member.

house, and parties, by reason of the trial of controverted elections;" and yet, the enactment which follows is clearly confined to petitioners only. The generality of the description, therefore, in the seventh section, is not sufficient to shew that it was meant to apply to the sitting member. In the thirteenth section, also, the expression "*any* action" occurs, but that does not vary the argument, for its operation is expressly confined to cases in which the former parts of the statute authorise the giving a certificate.

Starkie in reply. There is no doubt that the speaker has authority to decide whether a person has been summoned as a witness for a petitioner; he must, therefore, have the power in the case of a witness for a sitting member, for the objection, if good for any thing, applies equally to both cases.

Lord TENTERDEN C. J. I am of opinion, that upon the production of the speaker's certificate, we are bound to order judgment to be entered for the amount certified to be due. Two objections have been taken to this course: First, that the certificate may have been granted without a due inquiry as to whether the witness was summoned; and that the speaker had no power to make such inquiry; and this would apply equally to all witnesses, either for the petitioner or sitting member. think, we are bound to assume that the speaker will not certify that costs have been taxed to a witness *summoned*, unless he has had due proof before him that the witness was summoned. If the practice suggested be usual, which we cannot assume, application should be made to the speaker to correct it.

As

1828.

MAGRAVE against WHITE.

As to the other objection, viz. that the statute applies only to witnesses summoned for the petitioner, I think it is not so limited. In the seventh section we find the general terms *all cases*, and *any witness*; but if we could see clearly by other parts of the statute, that those words were intended to apply only to witnesses for the petitioner, we ought to give them that more limited construction. I am, however, at a loss to find any thing in the statute shewing such an intention. The preamble to the third section has been relied on to shew that general words may have the limited sense contended for, inasmuch as that preamble, in terms, extends to all cases, whereas the enactment that follows is confined to the petitioner only. But I am not aware of any rule of construction that confines the application of a preamble to the section immediately following. If that had been intended, I should have expected the recital to have applied to costs and expenses "payable by the petitioner," and not generally, to those "becoming due by reason of controverted elections." But the words of the seventh section are as general as those of this preamble, and as there is no rule confining the application of it to the third section, I think it may with propriety be applied

[redacted]

1828.

MAGRAVE against WHITE.

both; but I think the certificate is conclusive as to that point. Then, as to the other question, it seems to me that the recital before the third section is applicable to the seventh, and that both being general in their terms, there is nothing to shew an intention to confine their operation to one class of witnesses only. Again, the twelfth section provides a specific remedy for witnesses on behalf of the petitioner, by forfeiture of his recognizances; the thirteenth section is, therefore, of comparatively small importance to them; but if it does not extend to the sitting member's witnesses, the statute has made no provision in their behalf. I cannot, therefore, entertain a doubt that we ought to order judgment to be entered up for the amount certified to be due in this instance.

HOLROYD J., not having been present during the argument, declined giving any opinion.

LITTLEDALE J. concurred.

Motion granted.

The KING *against* SUTTON and Others.

Friday, June 20th.

Alienage is a ground of challenge to a juror; and if the party has an opportunity of making his challenge, and neglects it, he cannot afterwards make the objection. Semble, That since the 7 *G.* 4. *c.* 60. *s.* 27. alienage is not a ground even of challenge to a special juror.

INDICTMENT for a conspiracy. Plea, not guilty. At the trial before Lord *Tenterden* C. J., at the *London* sittings after last *Hilary* term, *Sutton*, and some other defendants, were found guilty, others were acquitted. The parties convicted being now brought up for judgment,

1828.

The King against Sutton.

Denman, on behalf of *Sutton*, moved for a new trial, on an affidavit that a special juror, who served on the trial, was an alien, and that this fact was not known to the defendant until after the trial. The 6 *G.* 4. *c.* 50., for consolidating and amending the laws relating to jurors and juries, in the first section enacts, that every man (except as thereinafter excepted) being the owner or occupier of certain descriptions of property there specified, shall be qualified and liable to serve on juries. In *s.* 2. there are certain exemptions from this liability, and *s.* 3. is expressly applicable to this case: "Provided also, that no man, not being a natural born subject of the king, is or shall be qualified to serve on juries or inquests, except only in the cases hereinafter expressly provided for;" which exception applies to juries de medietate. The subsequent provisions as to special juries do not introduce any new description of persons as qualified to serve, but relate only to the mode of selecting special jurors out of the general description before given. [*Bayley* J. What is the consequence if a person not entitled to do so, serves as a juryman?] The decision of the jury is void, and a new trial must be granted, *Rex* v. *Tremearne* (*a*).

[redacted]

not be *qualified* according to this act, the want of such qualification shall be good cause of challenge;" and the section concludes with a proviso "that nothing therein contained shall extend in any wise to any special juror." (He was then stopped by the Court.)

Lord TENTERDEN C. J. The enactment in the 27th section of this statute agrees precisely with that which had before been established by the common law, for in *Co. Lit.* 156 *b.* it is stated that aliens born may be challenged propter defectum patriæ. Now, I am not aware that a new trial has ever been granted on the ground that a juror was liable to be challenged, if the party had an opportunity of making his challenge. In the case cited, no such opportunity had been afforded. We ought to be very careful in giving way to such an application, for if we must grant a new trial at the instance of a defendant after conviction, we must, also, do it at the instance of a prosecutor, when there has been an acquittal; and it seems to me that, without a precedent, we ought not to interfere in this late stage of the proceedings. The proviso also, at the end of the 27th section, appears to have the effect of taking away even this right of challenge in the case of a special juror; probably because the party has had an earlier opportunity of making the objection.

Rule refused.

1828.

Saturday, June 21st.

The KING *against* RICHARDS and Others.

The stat. 7 *G.* 4. *c.* 74. *s.* 23., which provides for the allowance of costs to prosecutors and witnesses in certain cases of misdemeanor, does not apply where the indictment has been removed into K. B. by certiorari.

IN pursuance of a recognizance entered into before magistrates, the prosecutor, at the quarter sessions for *Salop*, preferred an indictment against the defendants for a riot; and the grand jury having found it a true bill, he afterwards removed it into this court by certiorari. The defendants were tried and convicted at the last Spring assizes for the county of *Salop*, and in *Easter* term

Campbell moved for a rule to shew cause why the prosecutor should not have his costs allowed under the 7 *G.* 4. *c.* 64. *s.* 23., by which it was enacted, "That where any prosecutor, or other person, shall appear before any court on recognisance or subpœna to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, &c., every such court is hereby authorized and empowered to order payment of

opinion that the act does not apply to cases where the indictment has been removed into the Court of King's Bench by certiorari.

1828.

The KING *against* RICHARDS.

Rule refused.

MOSES *against* RICHARDSON.

Monday, June 23d.

THE defendant, who was a married woman at the time when this action was brought, being sued as a feme sole, had suffered judgment to go by default, and had been taken in execution.

Archbold now moved to discharge her out of custody, on the ground that she was a married woman.

Lord TENTERDEN C. J. The defendant ought not to have suffered the plaintiff to incur the expense of executing a writ of enquiry. She must be left to her writ of error.

Rule refused.

MURRAY *against* REEVES, Gent., one, &c.

Wednesday, June 25th.

ASSUMPSIT for the breach of an agreement. Plea, non-assumpsit. At the trial before Lord *Tenterden* C. J., at the *Middlesex* sittings after *Michaelmas*

A., an insolvent, having petitioned the court for the relief of insolvent debtors to be discharged out of custody; and having been brought up before that court to be examined, was opposed by *B.*, a creditor, and remanded to a future day. Before that day arrived, *C.*, who acted as the attorney of *A.*, in consideration of *B.*'s withdrawing his opposition to *A.*'s discharge, undertook that *B.* should be the sole assignee of *A.*'s estate, and should receive 100*l.* out of it within three weeks from his appointment: Held, that this agreement was contrary to the policy of the insolvent act, and therefore void.

1828.

MURRAY against REEVES.

term 1827, the following appeared to be the facts of the case: The plaintiff had recovered judgment against *Alexander Shearer* for 2686*l.* The latter being detained in execution at the suit of the plaintiff, petitioned the court for the relief of insolvent debtors to be discharged out of custody. He was brought up for that purpose on the 21st of *July*, but was opposed by the plaintiff, and by his consent, it was referred to an officer of the court to examine the insolvent, and to make a report to the court. The insolvent was remanded on the 21st of *July*. Before that day the following agreement (for the breach of which the present action was brought) was entered into between the plaintiff and the defendant, the latter then acting as the attorney of *Shearer*. "On condition of Mr. *Murray* withdrawing his opposition, Mr. *Reeves* will undertake to consent that Mr. *Murray* shall be sole assignee of Mr. *Shearer*'s estate and effects; and to guarantee that Mr. *Murray*, as assignee, shall receive 90*l.* or 100*l.* out of the insolvent's estate within three weeks from his appointment as assignee, he taking the necessary steps which Mr. *Reeves* will point out to him; and also to guarantee 40*l.* in lieu of the furniture and effects which the assignee is entitled to as vesting in

1828.

MURRAY against REEVES.

sums of money with which he was charged, he, defendant, would pay those sums: the court held that the consideration was void, it being contrary to the policy of the bankrupt laws. Lord *Tenterden* C. J. was inclined to think that the contract between *Murray* and *Reeves* was illegal, but he reserved the point, and a verdict was found for the plaintiff for 105*l.*, with liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

Campbell and *Wyborn* on a former day in this term shewed cause. This agreement is not contrary to the policy of the insolvent debtor's act. *Nerot* v. *Wallace* (*a*) was decided on the bankrupt laws. Those laws impose certain duties on the bankrupt, the assignees, and the commissioners; and any agreement, the effect of which may be to prevent the performance of those duties, is void. That case was decided partly on the ground that the promise made by the assignees and which was the consideration for the defendant's promise, it was not in their power to perform. And Lord *Kenyon* admitted, that if *all* the creditors had consented to the agreement, it would have been valid. In the present case the plaintiff undertook for nothing which he could not perform. In *Kaye* v. *Bolton* (*b*), a covenant by a friend of the bankrupt to pay all his creditors their full debts, in consideration that they would not proceed any further under the commission, was held to be valid. The detention of the insolvent in custody is for the benefit of the detaining creditor, who may renounce that benefit, and consent to the discharge of the in-

(*a*) 3 *T. R.* 17. (*b*) 6 *T. R.* 134.

1828.

MURRAY against REEVES.

solvent even after he has been committed by the commissioners for a certain time; and if so, this agreement to consent to his discharge before examination must also be valid.

Sir J. Scarlett and *Hutchinson* contrà. The defendant's promise is founded upon a consideration that the plaintiff would withdraw his opposition to the discharge of an insolvent debtor, who had been brought before the Court to be examined. The object of the statute 1 *G.* 4. *c.* 119. was twofold: first, to relieve the insolvent debtor from imprisonment; secondly, to secure the creditors of the insolvent against fraud. The eighteenth section enacts, that "if it shall appear that the prisoner has been guilty of fraud, &c., the Court may order him to be imprisoned for three years." The effect of the agreement in this case was to prevent all examination into the conduct of the insolvent, and to withdraw him wholly from the penal jurisdiction of that Court. Such an agreement is, therefore, contrary to the policy of the act, and is calculated, also, to be injurious to the other creditors; for they may have been induced to withhold their opposition, because they be-

1828.

MURRAY *against* REEVES.

Lord TENTERDEN C. J. now delivered the judgment of the Court.

This was an action on an agreement, whereby the defendant, in consideration of the plaintiff's withdrawing his opposition to one *Shearer*, who had applied for his discharge under the act for the relief of insolvent debtors, undertook, among other things, to consent that the plaintiff should be the sole assignee of the estate of *Shearer*, to guarantee that the plaintiff should, as assignee, receive a sum of 90*l.* or 100*l.* out of the insolvent's estate within three weeks from his appointment as assignee, he taking the steps that the defendant should point out to him, and also to guarantee a sum of 40*l.* in lieu of the furniture and effects to which the assignee might become entitled as vesting in the insolvent in right of his wife. And the action was brought in respect of these two sums of money. At the trial, it appeared that *Shearer* had, in fact, been under examination as to his schedule, which is the usual practice of the Court in cases of opposition. And on the part of the defendant, it was insisted, that his engagement being made in consideration of withdrawing a creditor's opposition to the discharge of an insolvent debtor, was void in law. And we are of that opinion. It is obvious that a measure of this kind takes from the commissioners that superintendance, controul, and power of imprisonment for a time, which the legislature intended to vest in them; and, consequently, deprives the other creditors of the benefit of that full disclosure, voluntarily and freely to be made, which they are entitled to have. Such bargaining, whatever may have been intended or effected in the particular case, may, in many cases, give protection to fraudulent concealment, to the great prejudice of creditors, and is, therefore, in our opinion, contrary to the

1828.

Murray against Rayns.

the policy of this part of the law, and consequently void. It was urged, that a creditor may lawfully make *such a bargain as the present*, because he may at any time consent to the discharge of the debtor, even after he shall have been committed or remanded by the commissioners for a certain time. It may be true that a creditor may so consent, but if the debtor obtains his discharge in that manner, his relief under the statute, as to the debts of other creditors, will, in many cases, be rendered questionable; and if the imprisonment be under the seventeenth section, for fraudulent concealment, it will probably be lost. Whereas if the opposition made by one creditor be withdrawn, and no other creditor takes up the proceeding, the debtor may obtain the full benefit of the statute, without making that disclosure which the statute requires; and where one creditor has begun an opposition and withdraws it, other creditors may lose the opportunity of opposing, or may abstain from doing so under an opinion that the debtor has done all that the law requires of him. The law requires that the debtor shall make a full disclosure, and that he shall do so in the first instance by his schedule; a knowledge that the effect of concealment may be ob-

1828.

The President, Directors, and Company of the Bank of the State of SOUTH CAROLINA, in the United States of AMERICA, *against* JOHN ASHTON CASE, JOHN JACKSON, and WILLIAM BROWN, Assignees of the Estate and Effects of THOMAS CROWDER and HENRY THOMAS PERFECT, Bankrupts.

Wednesday, June 25th.

THIS was an issue, directed by the Vice-Chancellor, to try whether *Thomas Crowder* and *Henry Thomas Perfect*, the bankrupts, and *James Butler Clough*, were, on the 13th day of *August* 1825 (the date of the commission of bankrupt against *Crowder* and *Perfect*), indebted to the said plaintiffs in any, and what sum of money. The issue stated a promise by the defendants to pay the plaintiffs one shilling for every pound of the debt which might be due to the plaintiffs. And the plaintiffs averred 15,000*l.* to be due. The cause came on to be tried before *Hullock* B., at the assizes for the county of *Lancaster*, when a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case: — On the 3d of *November* 1815, *J. B. Clough* entered into articles of co-partnership with *Thomas Crowder* and *Henry Thomas Perfect*, the bankrupts, whereby they agreed to carry on the trade or business of a consignee or factor for persons trading

A., *B.*, and *C.* carried on business in co-partnership as factors and commission-merchants in *England* and *America*; in *England*, under the firm of *A.*, *C.*, and Co.; in *America*, in the name of *C.* alone. When *C.* went to *America*, he had written instructions from his partners, one of which was, "It is understood that our names are not to appear on either bills or notes for the accommodation of others, and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here." *A.*, *B.*, and *C.*, in order to obtain consignments from *America*, made advances or granted drafts or bills of exchange, or indorsements of them, to their principals on the security of the goods consigned. In order to obtain a consignment from *W.*, *C.* in his own name indorsed bills for him, which were to be provided for by others drawn by *W.* on *A.*, *C.*, and Co. in *England*, which were to be provided for by the proceeds of the consignment. Before the latter bills were presented for acceptance, *A.* and *B.* had become bankrupts: Held, that the indorsement of the bills by *C.* must be considered as an indorsement by the firm, and that they were liable upon those bills.

from

1828.

South Carolina Bank against Case.

from the United States of *America* to *England*, and such other branches of business as they should mutually agree upon in co-partnership for the term of four years, from the 1st of *January* then next; and by a clause in the articles it was declared, that the firm of the partnership should be "*Crowder, Clough*, and Co." It was also stipulated by the articles that *Perfect* should forthwith proceed to the United States of *America* to advance the business of the concern as consignees or factors, and in such other manner as might best answer the purposes of the partnership. That no one of the parties should carry on or be concerned in the business before mentioned on their own separate account, nor carry on any trade in partnership with any other person or persons whomsoever during the said term, nor should they carry on any trade or business on their own account, distinct from the said partnership, nor carry on any in the name or firm of the said partnership, or on account thereof, without the consent in writing of each of the parties. That proper books of account should be kept in *England* and in *America*, while *Perfect* was resident there, in which respectively should be fairly entered and kept the accounts, dealings,

[redacted]

1828.

SOUTH CAROLINA Bank *against* CASE.

from time to time mutually agree upon. And it was agreed that *Perfect* should have a yearly allowance of 600*l.* for such time as he should stay in *America* on the partnership account; and he again proceeded to the United States, where he continued two years, transacting the partnership business in his own name. On his return in 1821, it was agreed that the term of the co-partnership should be again extended two years, and that the parties should continue to carry on the said trade or business, and such other branches of business as they should from time to time mutually agree upon for that term; and that *Clough* should succeed *Perfect*: and a supplementary agreement was entered into, bearing date the 27th of *October* 1821, upon the like terms as the former articles, except as thereby altered in some matters not affecting the present question. And it was agreed that *Clough* should proceed to the United States, and use his best endeavours for the general benefit of the concern, and should have a yearly allowance of 500*l.* for such time as he should remain in *America* on the partnership account. Previous to *Clough*'s departure, written instructions were given him for his conduct in the United States. They bear date the 29th day of *October* 1821, and were signed by *Crowder* and *Perfect*, and they were approved of as a guide for the future conducting of business. In the instructions are the following paragraphs: — " No shipments to be made solely on our account, but the above price to regulate shipments in conjunction with other parties, when they require us to participate in the risk to induce them to make a consignment. It is to be hoped, however, that there will be no necessity to extend this sort of business, and that it will be as much avoided

1828.

South Carolina Bank against Case.

avoided as possible. Our main object is consignments, either of ships or produce, and with a view to secure such, should we be induced to risk a share of shipments, (if such can be had without, we should prefer it,) we should not wish a larger sum than 5000*l.* to be risked, even in the smallest degree, at any one time, in such participations; and the result of these shipments ought to be known, or safely calculated on, by advices from home, before any new arrangements are formed. It is understood that our names are not to appear on either bills or notes for the accommodation of others; and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here." The business of *Crowder*, *Perfect*, and *Clough* was that of factors or commission-merchants for principals trading between *Great Britain* and the United States. Their business in this country consisted principally in the sale and purchase of goods, and the collection of freights for principals in the United States on commission. Their business in the United States consisted in the sale and purchase of goods, and in the collection of freights for their principals in *England*, on commission, and occasionally in the pur-

[redacted]

1828.

SOUTH CAROLINA Bank *against* CASE.

bankrupts in *England*, and *Clough* in the United States, procured consignments for their joint benefit on commission; the bankrupts as to consignments to the United States for sale by *Clough*, and *Clough* as to consignments to *England* for sale by the bankrupts; *Clough* using his own name only in these, as well as all other, transactions in the United States. In order to obtain consignments from the United States, the bankrupts and *Clough* made advances, or granted drafts or bills of exchange, or indorsements thereof to their principals in the United States, upon the security of such principals' goods consigned to the bankrupts and *Clough* for sale in *Great Britain*; and the business relating thereto was conducted as follows: first, In some cases, bills of exchange were drawn in the name of *J. B. Clough* upon *Crowder, Clough*, and Co., in favour of their principals, and were delivered to such principals; secondly, In many other cases, bills of exchange were drawn by the principals upon *Crowder, Clough*, and Co., and indorsed in the name of *J. B. Clough*, and delivered to the principals with such indorsements; thirdly, In other cases, bills of exchange were drawn by *J. B. Clough*, in his own name, on *Crowder, Clough*, and Co., and indorsed by him, and sold, and the proceeds advanced to the consignors; fourthly, In other cases, *J. B. Clough* used to raise money for advances to consignors by drawing upon *American* houses in *New York*, or by the consignors drawing on them, and *J. B. Clough* provided for these bills by sending to the *American* houses bills on *England* to be discounted there; bills on *England* not being always negociable at *Charleston*. Consignments of cotton were procured by *J. B. Clough*, by means of these trans-

1828.

South Carolina Bank *against* Case.

transactions, to the *English* house for sale, on account of the consignors, to a very great amount. *Clough* also bought and sold bills of exchange in his own name on speculation, the profit and loss whereof was carried to the partnership account. *Clough* also sold and purchased goods in *America* in his own name, for *English* principals, to a large amount. The profits made by the partnership in *America*, in commission and exchange speculations, in the name of *J. B. Clough* were very considerable, amounting in 1822 to 1377*l.*, in 1823 to 2700*l.*, in 1824 to 5000*l.*, but in 1825 there was a loss. Proper partnership books were kept: the bankrupts entering in their books all the dealings and transactions in this country, and *Clough* entering in the books kept by him in *America* all the dealings and transactions in the United States. At the end of each year the annual balance of profit and loss in *England* and in the United States was divided between the partners. *Clough* during the whole time that he was in the United States, viz. from 1821 to the bankruptcy, never traded or drew, indorsed, accepted, or negotiated any bills of exchange, or carried on any business on his own account. But he entered into a joint speculation, intending it to be on

him in trade, or in drawing, indorsing, or accepting, or negotiating bills of exchange, except for the benefit and on account of the partnership; and all the partnership business in the United States was carried on in that name and no other, save when the consignors of goods drew bills of exchange on *England* on account of their consignments; in which cases they always drew on *Crowder, Clough*, and Co. *Clough* was restricted by the partnership articles from transacting any business there in any manner whatever, except on the partnership account. *Clough*, who was the only witness examined on either side at the trial, swore that there was no specific agreement between him and his partners that there should be a house under the name of *J. B. Clough* in *America*; that he was sent out to form a branch of the house in *America*; that he had instructions not to use their name; that he had no doubt that they intended he should form a branch of the house, and that the branch was carried on in *America* in the name of *J. B. Clough*, with the sanction of all the three partners, although there was no specific agreement that it should be so carried on. *Clough* obtained from *J. T. Weyman*, of *Charleston*, consignments of a large quantity of cotton to the house of *Crowder, Clough*, and Co. for sale on *J. T. Weyman*'s account, and it was agreed between *Weyman* and *Clough* that *J. T. Weyman* should draw bills upon *Coffin* and *Weyman*, of *New York*, merchants, payable to *Clough*, and that *Clough* should indorse them; it being understood between them that the *Carolina* bank would discount them, in order to make advances to *J. T. Weyman* on the credit of the consignments. Four bills were accordingly drawn by *Weyman* on *Coffin* and *Weyman* for 40,000 dollars, payable to *J. B. Clough* or

 order,

1828.

South Carolina Bank against Case.

order, and being indorsed "*J. B. Clough*," were discounted by the plaintiffs, who are a banking corporation duly constituted by the laws of the United States. It was further agreed between *Clough* and the consignor, *J. T. Weyman*, that the latter should draw other bills on *Crowder*, *Clough*, and Co., in order to provide *Coffin* and Co. with cash to pay the four bills on them when at maturity, which latter bills were to be paid by *Crowder*, *Clough*, and Co. out of the proceeds of the consignments in their hands. Bills were accordingly so drawn, and sold by *Coffin* and Co. to the amount of 5000*l.*, which house, however, stopped payment soon afterwards, and the proceeds of the bills were misapplied; and *Crowder*, *Clough*, and Co. soon afterwards failing, the bills upon them were not paid. All the consignments, however, agreed to be made by *J. T. Weyman* to the house in *England* were made, and received by the *English* house, and disposed of by them. Bills on *England* are not, in general, negotiable in *Charleston*, this was the cause of the arrangement for drawing bills in the first instance on *Coffin* and *Weyman*. The bills in question were duly presented to *Coffin* and Co. at maturity, and dishonoured, and due notice given to *J. B. Clough* in

his partners from the sale of these bills on *Coffin* and Co. in *America*, and, therefore, no entry was made by *J. B. Clough* in the books kept by him. *J. B. Clough* had no separate estate. If the plaintiffs are entitled to recover, a verdict is to be entered for 416*l.* 13*s.*, the amount of the debt due from *Crowder*, *Perfect*, and *Clough* being 8333*l.* 6*s.* 8*d.*; if not, a nonsuit is to be entered.

Parke for the plaintiffs. It is clear that the bills in question were indorsed in the course of the partnership business of *Crowder*, *Clough*, and Co., and to raise funds for partnership purposes. They were indorsed in the nome of *J. B. Clough*, and the only question is, whether that made him individually liable, or whether, under the facts found, that signature must be taken as the copartnership name. Now the case states, that all the business of the firm in *America* was carried on under that name. It is true that in ex parte *Emly* (*a*) and *Emly* v. *Lye* (*b*), it was held, that the indorsement of one partner does not make the firm liable, although the money thereby raised may be applied to partnership purposes, if the indorsement cannot be treated as the indorsement of the firm; but, on the other hand, it is clear that a firm consisting of several may carry on business in the name of an individual partner, and then the whole firm will be bound by acts done by him as representing the firm, ex parte *Bolitho* (*c*) The only question, therefore, is, whether the name of *J. B. Clough* on these bills, is to be treated as the copartnership name. Clearly it must, for all the business in

(*a*) 1 *Rose*, 61. (*b*) 15 *East*, 7. (*c*) *Buck*. 100.

1828.

South Carolina Bank against Case.

America was carried on in that name, with the sanction of the partners in *England*, and the transaction in question was for the benefit of the partnership.

Patteson contrà This transaction was clearly a discount for the accommodation of *J. T. Weyman*, and not for the use of the partnership. If the name of *J. B. Clough*, in which the bills were indorsed, can be considered as the name of the firm, he, by making that indorsement, violated the instructions given when he went to *America*, in which it is expressly stated, "It is understood that our names are not to appear on either bills or notes for the accommodation of others, and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here." Now, the authority of one partner to bind the firm, must depend upon the partnership articles. Here *Clough* had no such authority, the bills in question being for the accommodation of others, and not regarding a direct transaction with the house in *England*. This mode of dealing might have rendered the firm of *Crowder, Clough*, and Co. liable to two sets of bills, those

1828.

SOUTH CAROLINA Bank *against* CASE.

and we think that, under the circumstances stated in the case, *J. B. Clough* is to be considered as the name of the firm for the purposes of business in *America*. That being so, the bankrupts and *Clough* were liable as indorsers of the bills; and a verdict must be entered for the Plaintiffs for the sum agreed upon at the trial.

Postea to the Plaintiffs.

GIBBINS and Another, Assignees, *against* PHILLIPS.

After a verdict for a defendant, the Court made a rule absolute for a new trial, and ordered that the costs of the former trial should abide the event of such new trial. The record was carried down to the Spring assizes following, when it was made a remanet. It was tried a second time at the Summer assizes, when a verdict was again found for the defendant. The Court afterwards ordered that that verdict should be set aside, and a new trial had between the parties upon payment of the costs of the last trial, and that the costs of the first trial should abide the event of such new trial. Upon the third trial a verdict was found for the plaintiff: Held, that the plaintiff was entitled to the costs occasioned by the cause having been made a remanet at the assizes next following the term when the first rule was made absolute for a new trial.

THIS cause was tried at the Summer Assizes for the county of *Stafford* 1826, when a verdict was found for the defendant. The Court ordered that that verdict should be set aside, and a new trial had between the parties, and that the costs of the former trial should abide the event of such new trial. The record was again carried down to the Spring Assizes 1827, *when it was made a remanet*. It was tried a second time at the Summer assizes 1827, when a verdict was again found for the defendant. The Court afterwards ordered, that that verdict should be set aside, and a new trial had between the parties *upon payment of the costs of the last trial*, and that the costs of the first trial should abide the event of such new trial. The costs of that trial (not including those of the remanet) were paid by the plaintiffs to the defendant. The cause was tried a third time at the Spring assizes 1828, when a verdict was

1828.

GRIFFITHS against PHILLIPS.

found for the plaintiffs. The master allowed to the plaintiffs the costs (177*l.* for witnesses), occasioned by the cause having been made a remanet at the Spring assizes 1827. A rule nisi having been obtained for the master to review his taxation,

Taunton and *Holroyd* shewed cause. The general rule is, that where a cause is made a remanet, the costs thereby incurred abide the ultimate event of the cause, *Standen* v. *Hall* (*a*), *Sadler* v. *Evans* (*b*). Here the plaintiffs have ultimately succeeded, and are entitled to the costs occasioned by the cause having been made a remanet.

Barstow contrà. The general rule undoubtedly is, that the costs of a remanet are considered costs in the cause, and go to the party who finally succeeds. But in this case a rule for a new trial was made absolute upon condition that the costs of the second trial should be paid by the plaintiffs. Now the Court must have intended to have included the costs of the remanet in the costs of that trial, for they in terms provide for the costs of the first and of the second trial. When those costs

1828.

GIBBINS *against* PHILLIPS.

remanet. Here the plaintiffs have ultimately succeeded. I think that, as the rule made by the Court after the second trial did not provide in express terms for the costs of the remanet, they ought to be considered as costs in the cause, and that they were properly allowed as such by the master. The present rule must, therefore, be discharged.

Rule discharged.

The KING, on the Prosecution of G. SPURGING, *against* GILKES and Others.

An order of justices requiring the stewards of a benefit society to readmit *A. B.*, who had been expelled, recited that it had appeared to the justices that the rules of the society had been enrolled at the quarter sessions. On the trial of an indictment against the stewards for disobeying such order: Held, that the recital was not evidence of the enrolment of the rules.

INDICTMENT stated that *S. T.* and *W. B.*, esquires, two of the justices of our lord the King, made an order under their hands and seals, which order was as follows, that is to say: "*Middlesex* to wit, To *W. Gilkes*, *S. Ward*, *R. Carpenter*, *G. Bowden*, *J. Hubbard*, and *J. M'Clean*, stewards of a friendly society, called The *Alfred* Union Benefit Society, held at, &c., in the parish of *Christ Church*, in the county of *Middlesex*, and to each of them, and to all and every other member and members of the said society; whereas *G. Spurging*, of the parish of *Christ Church*, in the county of *Middlesex*, on the 19th *March* instant, at the police-office in *Worship Street*, *Shoreditch*, in the said county of *Middlesex*, came before us *W. B.* and *S. T.*, two of the justices of our lord the King, assigned to keep the peace of our lord the King, in and for the county of *Middlesex*, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, near unto the place where the said society is now established, and made a complaint upon oath, that he, *G. Spurging*, having been duly admitted a member

1828.

The King against Gilles.

of the society, established pursuant to the statutes in that case made and provided, thought himself aggrieved by a certain act done by the society, for being excluded from the benefit of the society, contrary to the rules, orders, and regulations of the society, and it appearing *to us, the said justices, that the said rules, orders, and regulations have been allowed and confirmed by the justices of the peace for the county of* Middlesex, *assembled at the general quarter sessions* of the peace, holden in and for the said county, according to the directions of the said statutes, we, the said justices, did duly issue our summons to the stewards of the society, they being the principal officers of the society, to appear before us, the justices, and answer the complaint so made by him, *G. Spurging*, and thereupon, in pursuance of such summons, the said *S. Ward*, one of the stewards, *R. Cole*, the president, with others, members of the society, do appear before us, and we the said justices in the presence of *S. Ward*, one of the stewards, *R. Cole*, the president, and others, members of the said society, proceed to hear and determine, in a summary way, the matter of such complaint, according to the true intent and meaning of the said rules, orders, and regulations, and after hearing the allegations of

1828.

The KING against GILKES.

fused to restore and re-admit the said *G. Spurging* to be a member of the society, as by the said order they were required to do. Plea, not guilty. At the trial before Lord *Tenterden* C. J., at the *Middlesex* sittings, after *Michaelmas* term, 1827, the order of justices set out in the indictment, was put in evidence on the part of the prosecution, and no other proof, but the recital in that order, was given that the rules and regulations of the society had been duly enrolled at the sessions, pursuant to the statute 33 *G.* 3. *c.* 54. *s.* 2. It was contended by the defendant's counsel, that the justices had no jurisdiction over the members of this society under the fifteenth section (*a*), unless the rules had been duly enrolled, pursuant to the statute, that it lay upon those who said that the order was legal, to shew the enrolment, and the recital in the order of the justices, was not evidence of that fact. Lord *Tenterden* C. J. directed the jury to find a verdict of guilty, but reserved liberty for the defendants to move to enter a verdict of acquittal. A rule nisi having been obtained for that purpose,

(*a*) That section enacts, "That if any person having been admitted a member of any such society, shall think himself aggrieved by any act done or omitted by any such society, or person acting under them, it shall be lawful for two justices near unto the place where such society shall be established, upon complaint made, to issue their summons to the president, wardens, stewards, or other principal officers of such society, and also all such persons as shall appear to have the custody of the rules, &c. of such society, and such justices, upon proof on oath of such summons having been duly served, shall proceed peremptorily to hear and determine in a summary way the matter of such complaint, according to the true meaning *of the rules*, &c. of such society, *confirmed by the justices aforesaid*, and shall make such order therein as to them shall seem just, which shall be final to all intents and purposes, and shall not be subject to appeal, nor removable into the courts at *Westminster*."

By the 59 *G.* 3. *c.* 128. the provisions of the 33 *G.* 3. *c.* 54. are made applicable to all societies formed under the authority of that act.

Sir

1828.

The King against Gilles.

Sir *James Scarlett* and *D. Pollock* now shewed cause. The order is good on the face of it. It is a general rule that every thing is to be presumed in favour of an order of justices. In *Rex* v. *Clayton* (*a*) an order of bastardy having been confirmed on appeal, and having been removed into this Court, together with the order of sessions confirming the same, the Court said it must be intended that the examination in writing of the deceased's mother had been proved before the magistrates. Here the order is undoubtedly void, unless the rules of the society were enrolled. It recites that it had appeared to the justices that the rules had been duly enrolled. That recital is, at all events, primâ facie evidence of the fact of enrolment, for, unless they were so enrolled, the order is not valid. It must be presumed, therefore, that they were enrolled.

Reader and *Adolphus* contrà. The burden of proving that this order was valid lay on the prosecutor. The defendants committed no offence by disobeying the order, unless it was an order warranted by law. The justices had no jurisdiction to make such an order, unless the rules of the society were duly enrolled at the sessions. The jus-

be made in favour of such an order, collected from the order itself that she was examined on oath, and refused to quash it. Here the order is undoubtedly good on the face of it; but it was incumbent on the prosecutor, who charges the defendants with an offence against the law, to shew that it was a valid order, not only on the face of it, but that it was one which, by the statute, the justices had jurisdiction to make. The recital of the enrolment of the rules is no evidence of that fact against the defendants, who never concurred in, or assented to, the making of the order. It is no more than the affirmation (not upon oath,) of that fact by a third party. The justices had a special authority limited to cases where the rules of the society had been enrolled. And *Rex* v. *Chittinston and Penhurst* (*a*), shews that such a special authority must be strictly pursued.

Lord TENTERDEN C. J. According to the general rule the prosecutor was bound to establish, by legal proof, that the offence charged in the indictment had been committed by the defendants. In order to shew that an offence was committed in this case, it was necessary to make out that the order was one which the magistrates had authority by law to make. They had no such authority, unless the rules of the society of which the defendants were members, had been enrolled at the sessions. That fact it was necessary to substantiate by legitimate proof. The recital in the order of justices, that the rules had been enrolled, was not, as against the defendants, legal evidence of that fact. The rule for setting aside the verdict must, therefore, be made absolute.

Rule absolute.

(*a*) 2 *Salk.* 475.

1828.

In re WASHBOURN.

A creditor had obtained judgment by default against his debtor, since the statute 6 G. 4. c. 16. s. 108., and the goods having been seized by the sheriff before, but not sold until after an act of bankruptcy was committed by the debtor, the Court refused to compel the sheriff to pay over the proceeds of the sale to the assignees of the bankrupt.

JOHN WASHBOURN carried on the trade of a bookseller in partnership with his father *John Washbourn* the elder. They having become indebted to *Thomas Washbourn*, executed a warrant of attorney, dated the 2d of *April* 1824, authorizing certain attornies therein named to confess a judgment by nil dicit against them for 6200*l.*, subject to a defeazance that no execution was to be issued unless default was made in payment of the sum of 3100*l.* to the said *Thomas* on the 2d of *October* then next. *Thomas Washbourn* died on the 4th of *May* 1824, no part of the sum of 3100*l.* having been paid to him. *J. Washbourn* and his father continued to carry on the trade of a bookseller in the city of *Gloucester* until *January* 1828. On the 25th of that month all the stock in trade and goods of the partnership were taken possession of by the sheriffs of *Gloucester*, by virtue of a writ of fieri facias issued out of the King's Bench upon a judgment before then entered up on the said warrant of attorney.

[redacted]

1828.

In re WASHBOURN.

had been committed by the partners, and that a docket had been struck; but notwithstanding such notice, the sheriffs proceeded to sell the goods so seized by them, and actually sold them on the 26th of *February*. The proceeds amounted to 1080*l*. A rule nisi having been obtained, calling upon the sheriffs to shew cause why they should not pay over to the assignees that sum, upon the ground that as the goods were not sold at the time when the act of bankruptcy was committed, the executor of *Thomas Washbourn* was a creditor, having a security within the meaning of the 6 *G.* 4. *c.* 16. *s.* 108. as it was construed in the case of *Wymer* v. *Kemble*. (*a*)

Taunton now shewed cause. It is at least very doubtful whether the assignees are entitled to the proceeds of the goods sold under this execution. The goods were seized before, but not sold till after the act of bankruptcy. Before the 6 *G.* 4. *c.* 16. goods seized under a fieri facias were not affected by a subsequent act of bankruptcy, *Cole* v. *Davies* (*b*). The 108th section of that statute enacts, "that no creditor having security for his debt, shall receive upon any such security more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon any part of the property before his bankruptcy." Here the execution was levied by seizure upon the bankrupt's goods before the bankruptcy. It is true that there is a proviso that no creditor who shall sue out execution upon any judgment obtained by default, &c. shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with the

(*a*) 6 *B.* & *C.* 479. (*b*) 1 *Ld. Raym.* 724.

other

1828.

In re WASHBOURN.

other creditors. But it is at least doubtful whether that proviso will deprive a creditor, who has obtained judgment by default and levied by seizure, of the benefit of his execution. In the case of *Wymer* v. *Kemble* (*a*), the goods had been seized and sold to the execution creditor, and it was held that after such sale he was not a creditor, having security for his debt within the meaning of that statute. Then, if this be doubtful, the Court will not compel the sheriff in this summary way to pay over the money to the assignees, but will leave them to bring their action. It has never been the practice for the Court so to interfere. The effect of making the rule absolute might place the sheriff in a situation of difficulty, if, after he has paid over the money to the assignees, the commission be superseded. If the Court interfere in this summary mode in this case, they may be called upon to do so by assignees in every case where judgment has been obtained after verdict. In *Taylor* v. *Taylor* (*b*), the Court refused an application by the assignees of a bankrupt to set aside an execution issued upon a judgment obtained by nil dicit, and served and levied upon the property of a bankrupt before his bankruptcy.

Campbell contrà. The true construction of the 108th section of the 6 *G.* 4. *c.* 16. is, that a creditor who obtains judgment after verdict, has a right to the goods if they are seized before the bankruptcy, but that upon judgment by default, confession, or nil dicit, he has no right unless the execution has been perfected by a sale. In *Wymer* v. *Kemble*, that was the construction which

(*a*) 6 *B.* & *C.* 479. (*b*) 5 *B.* & *C.* 392.

the

the plaintiff's counsel contended ought to be put on the statute; and Lord *Tenterden*, in delivering his judgment, said that that was a reasonable construction. Then, if that be so, the assignees are clearly entitled to the proceeds of the sale in this case; and *Notley* v. *Buck* (*a*) is an authority to shew that it was the duty of the sheriff to pay over the money to them, and the Court will compel him so to do if justice will thereby be effected. The execution creditor had an opportunity of pointing out by affidavit the objections (if there were any) to the validity of the commission. Not having stated any, it must be assumed that the commission is valid. Then, if that be so, the sheriff cannot be put to any inconvenience in consequence of this rule being made absolute. It may be beneficial to the execution creditor; for if the money be paid by the sheriff to the execution creditor, the assignees may recover it from him in an action for money had and received, and he will thereby be subjected to the costs of an action.

Lord TENTERDEN C. J. I think that the safest course will be to discharge this rule. It is impossible to say to what extent we may be called upon to exercise a summary jurisdiction, if we were to make the present rule absolute. It is said that we ought to do so, because the judgment-creditor has not by his affidavit shewn that there is any objection to the validity of the commission. There may, however, be objections to the validity of the commission, which may not now be known to him, or which, if known, it may not be prudent for him to disclose. Upon the whole, I think that this rule ought to be discharged.

Rule discharged.

(*a*) Ante, 160.

1828.

BAILEY, surviving Assignee of W. HALLIWELL, a Bankrupt, *against* CULVERWELL, BROOKS, and CARROLL (*a*).

A. and Co., as brokers for *B.*, sold goods, then in their possession, to *C.*, which were paid for by a bill drawn by *C* and accepted by *D.* *C.* ordered *A.* and Co. to keep the goods in their hands, and sell them if they could make a certain profit. Before the bill became due *D.* failed, and *A.* and Co. applied to *C.* for security for the bill; whereupon he gave them an order to sell the goods and apply the proceeds in payment of the bill. *C.* after-

TROVER brought by the plaintiff and *Richard Emett*, since deceased, as assignees of *William Halliwell*, a bankrupt, to recover 424 beaver skins. Plea, not guilty. At the trial before Lord *Tenderden* C. J., at the *London* sittings after *Hilary* term 1827, a verdict was found for the plaintiff for 1000*l.*, subject to the following case: —

The defendant *Carroll*, in *December* 1823, sold a quantity of beaver skins by a contract in writing to the bankrupt, through the agency of the other defendants, *Culverwell* and *Brooks*, brokers, who had the skins in their possession, for 427*l.* 5*s.* 6*d.*, to be paid for by the bankrupt's bill on Messrs. *Walducks* and *Hancock*, payable at four months after date. The bankrupt's bill on Messrs. *Walducks* and *Hancock*, was sent to the defendants *Culverwell* and *Brooks*, according to the terms of the contract, inclosed in a letter of which the following

for the beaver, and if you can obtain 2*s*. per pound profit, sell them; at present let them remain with you on that principle.

"WILLIAM HALLIWELL."

"*January* 14th, 1824."

This bill was immediately handed over by the defendants *Culverwell* and *Brooks* to the defendant *Carroll*. In consequence of the above letter, the goods remained with the brokers for sale. On the 16th of *March*, before the bill became due, *Walducks* and Co. the acceptors of the bill stopped payment, and the defendant *Culverwell* in consequence thereof applied to the bankrupt for a further security, when he obtained from him the following letter: —

"Messrs. *Culverwell* and *Brooks*.

"Please to sell the beaver you hold of mine, and take the proceeds to pay my bill on *Walducks* and *Hancock*; any profit arising from it pay over to me.

"Yours, &c.

"WILLIAM HALLIWELL."

"*March* 16."

The goods were not sold in pursuance of this letter, but remained with the defendants *Culverwell* and *Brooks* until they were delivered under an order of defendant *Carroll*, as after mentioned.

The bill of exchange was dishonoured on arriving at maturity, and notice thereof was duly given to the bankrupt on the 17th of *May*; and the defendant *Culverwell*, when examined before the commissioners, stated, that on the said 17th day of *May* they were attached at the suit of *Edward Carroll*, by process out of the court of the Lord Mayor of the city of *London*.

 A com-

1828.

BAILEY against CULVERWELL.

A commission of bankrupt issued against the bankrupt on the 4th of *June* 1824, which was opened on the 11th of *June*, on an act of bankruptcy committed on the 21st of *May* preceding; and the plaintiff and one *Richard Emett* (who died since the commencement of this action), were duly chosen assignees, and the usual assignment made to them by the commissioners previous to the making of the demand hereinafter mentioned. On the 14th of *July* 1824, the defendant *Carroll* gave an order to the other defendants to deliver the skins, to a porter who brought the order, on his account, which was accordingly done. On the 5th of *November* 1824, *Carroll* gave an order to the other defendants to receive back the skins, and such defendants, on the same day, received them again into their possession, where they remained until after the trial.

On the 15th of *November* 1824, the plaintiffs caused a demand of the skins to be made upon the defendants *Culverwell* and *Brooks*, and at the same time offered to pay the charges for warehousing the same, when the said defendants referred the plaintiff to their attornies, and refused to deliver them up.

It was agreed on the trial that the skins should be

ants or any of them have either a lien upon the skins, or a special property or equitable interest in them. It is clear that they have not. Suppose, instead of the order to sell the goods and pay *Carroll* out of the proceeds, the bankrupt had given an order to keep the goods for *Carroll*, or to hand them over to him, even that would not have given him any interest in them, nor would it have justified *Culverwell* and Co. in withholding them from the assignees of bankrupt. For no communication on the subject of the order had been made to *Carroll*, it was not procured at his request, nor did he give any credit in consequence. It would have been a mere order by the bankrupt to his agent to do a certain thing which was not in fact done; and the bankruptcy would operate as a revocation of the order. It may be likened to an order to pay money which is revocable, until it has been communicated to the creditor, and is revoked by bankruptcy. In *Scott* v. *Porcher* (*a*), it was held by the Master of the Rolls (Sir *W. Grant*) that a mandate by a principal to his agent accompanying certain goods consigned for sale, to pay over the proceeds to a third person, to which mandate the agent assented, gave no interest to that person until it had been communicated to him; but it was revocable by any disposition of the property inconsistent with the execution of the mandate. *Williams* v. *Everett* (*b*), and *Yates* v. *Bell* (*c*), shew that the same principle has been adopted in this Court. In the present case, when the bill was given by the bankrupt to *Carroll*, the defendants *Culverwell* and Co. were functi officio as to him. They held the goods on account of the bankrupt, in the

(*a*) *3 Mer.* 652. (*b*) *14 East*, 582. (*c*) *3 B. & A.* 643.

 same

1828.

BAILEY against CULVERWELL.

same manner as if *Carroll* had delivered the goods into the hands of the bankrupt, and he had afterwards delivered them to *Culverwell* and Co. Nothing done since that time has given *Carroll* a right to the possession of the goods. When the bill was likely to be dishonoured, *Culverwell* and Co. obtained a letter from the bankrupt authorizing a sale of the goods, but that was without communication with *Carroll*, and not as his agents. Suppose the skins had afterwards been destroyed by fire, *Carroll* would still have remained a creditor for the whole of his claim. [*Littledale* J. Although *Culverwell* and Co. were not directed by *Carroll* to apply to the bankrupt for security, might he not afterwards adopt their act?] Not after the rights of third persons intervened, as was the case here by the bankruptcy. But, secondly, if the assignees are not entitled to recover the full value of the skins, still they are entitled to nominal damages. *Culverwell* and Co. were authorized to sell the goods, but instead of that they handed them over to *Carroll*, that was assuming a control which was unauthorized by *Halliwell*, and gave the assignees a right of action, *Solly* v. *Rathbone* (*a*). The order was to pay the money on a contingency, viz. the sale, which had not arisen at

upon the bankrupt. The first question, therefore, is, What was the effect of the sale to the bankrupt, and of the interference of *Culverwell* and Co. on the 16th of *March*, and the letter then written by the bankrupt. If he was bound by it so as to give *Carroll*, if he acceded to it, a right to have the goods sold and the proceeds paid over to him, then when *Halliwell* became bankrupt, the goods remained in the hands of *Culverwell* and Co., subject to that right. When the goods were originally sold by *Carroll*, and placed in *Culverwell*'s hands, the property vested in *Halliwell*, and *Culverwell* held them as his agent; and if nothing had been done by him to vary the relation in which *Culverwell* stood with him, the goods would have remained his, and his assignees would have been entitled to the possession of them. But on the 16th of *March* it was found that the bill was bad, and *Culverwell* made application for further security. In what character was that application made? In the first instance, acting as agent for the seller, he stipulated for a bill; when it was found that the bill would probably be unproductive, he applied for further security; that could only be in the character of a person acting for and on behalf of *Carroll*. It was not, indeed, by virtue of any prior authority, but there are cases innumerable establishing that the subsequent ratification of an act done by an agent relates back to the time when it was done. This was an act done for the benefit of *Carroll*; it was an act that could not prejudice, but might be beneficial to him; and the presumption is, that a party will adopt acts done for his benefit. Now, the order by *Halliwell* to *Culverwell* to sell the goods and pay *Carroll*, was given on the 16th of *March*, and, by relation, *Carroll*'s adoption would make

1828.

BAILEY *against* COLVERWELL.

it binding from that time. At that time *Halliwell* had power to give the order, and if the adoption is to be referred to that date, he had no longer any power to revoke. The case of *Scott* v. *Porcher* is altogether different. There the order was given by a principal to his agent, in that character alone: he might, therefore, at any subsequent time control that agency. Here *Culverwell* and Co. were not agents for *Halliwell* only, but for *Carroll* also. It has been urged, that if after the order was given the goods had been destroyed by fire, the debt to *Carroll* would have remained, but that is the case with respect to every debt where goods upon which there is a lien for it are accidentally destroyed. The debt remains although the lien is lost. Has any thing been done by *Carroll* to reject the arrangement made between *Halliwell* and *Culverwell?* It appears that an attachment was issued by him, but what became of it is not stated. That proceeding did not necessarily repudiate the benefit of *Halliwell's* order. Perhaps *Carroll* did not then know of the order, and he may have abandoned the attachment upon being informed of the order. We now come to the question, What is the legal operation of the transaction of the 14th of *July*, when

these reasons I think that *Halliwell* and his assignees were bound by the bargain of the 16th of *March*, that the delivery to *Carroll* was not a good ground of action, and, consequently, that a nonsuit must be entered.

LITTLEDALE J. I am entirely of the same opinion. After the goods were sold, and the bill delivered in payment, both the property and possession were out of *Carroll*, and the goods were entirely at the disposal of *Halliwell*. *Culverwell*, however, applied to *Halliwell* for security. In what character did he do so? He sold the goods and received the bill for *Carroll*, and had nothing whatever to do with it on his own account. *Halliwell*, upon his application, gave the letter authorizing a sale of the goods and the application of the proceeds to the payment of his debt to *Carroll*. It is said that as this was not communicated to him, and there was no evidence of his having ratified the act of *Culverwell*, he is to be treated as a stranger, and cannot avail himself of it after the bankruptcy of *Halliwell*. These matters certainly are not expressly stated; but if the Court, from the facts stated in the special case, can reasonably infer that there was such ratification, they may give judgment accordingly. Now it is clear that *Carroll* was endeavouring to secure himself as far as possible, for he made an attachment, and it is but reasonable to suppose that he would ratify any act done by *Culverwell* for his benefit. Then as to the second point, the facts do not shew a wrongful conversion. The case differs from *Solly* v. *Rathbone*; there the factors of the plaintiff had handed over the goods to the defendant upon some arrangement between them, and the latter had actually sold them. Here the goods were

1828.

BAILEY against CULVERWELL.

returned by *Carroll*, and were in the hands of *Culverwell* and Co. at the time when the demand was made. The rule for entering a nonsuit must, therefore, be absolute.

Rule absolute.

SWANN *against* The Earl of FALMOUTH and JENNINGS.

Where a landlord's agent went upon the tenant's premises, walked round them, and gave a written notice that he had distrained certain goods lying there for an arrear of rent, and that unless the rent was paid, or the goods replevied within five days, they would be appraised and sold, and then went away, not

CASE for an excessive distress. Plea, not guilty. At the trial before *Gaselee J.*, at the last Spring assizes for *Cornwall*, it appeared that the plaintiff was tenant to the Earl of *Falmouth* of a wharf called *Point Quay*, at the yearly rent of 150*l.*, where he carried on the business of a dealer in coals, timber, iron, and other things. On the 9th of *January* there was an arrear of rent amounting to 262*l.* 10*s.* due to the earl, and on that day the other defendant (clerk to the earl's attorney) went to the plaintiff's premises and inquired of his clerk whether the plaintiff was there. He was answered in the negative, and then said, "Mr. *C.*, Lord *Falmouth*'s

1828.

SWANN *against* The Earl of FALMOUTH.

thereunto belonging, situate, lying, and being in the parish of *Feock*, in the county of *Cornwall*, which you now hold of him at the yearly rent of 150*l.*, the following goods and chattels, to wit, a quantity of coals now lying in heaps on *Point Quay* aforesaid, a quantity of slate ditto, a quantity of balk ditto. All which goods and chattels I have left on the said premises, and have distrained the same for the recovery of the sum of 262*l.* 10*s.* due to him at *Christmas* last, for rent and arrears of rent of the said premises. And you are further to take notice, that unless you pay the said rent and arrears so due, together with the costs and charges of this distress, or cause the said goods and chattels to be duly replevied within five days from the delivery hereof, the same will be appraised and sold according to law. Dated 9th *January* 1827." Defendant *Jennings* and the steward then went away, and did not leave any person in possession of the goods seized, which were worth more than 1000*l.* On the 12th of *January*, the plaintiff requested that some handbills which had been prepared to give notice of a sale of the distress, might not be published; this was consented to, and he afterwards paid the arrears. All the goods on the wharf having been seized, the plaintiff was prevented from carrying on his business for several days. Upon these facts, it was contended for the defendants, that the mere walking round the premises, without marking or even touching the goods, or leaving any person there to keep possession, did not amount to a seizure, and that, consequently, the action was not maintainable. The learned Judge overruled the objection, and left the case to the jury, who found a verdict for the plaintiff with 40*l.* damages. In *Easter* term a rule nisi for a new trial was obtained,

on

1828.

SWANN against The Earl of FALMOUTH.

on the grounds that no seizure was in fact proved, and that the damages were excessive; and now the Court called upon

Follett to support the rule on the first ground. The goods were not placed in the custody of the law by that which was done by the defendant *Jennings* and Lord *Falmouth*'s steward. They merely walked round the premises, but did not touch the goods, and then went away without leaving any person in possession. The plaintiff might, therefore, have disposed of the goods at any time, and if he abstained from doing so under the mistaken notion that they were in the custody of the law, that does not give him a right of action. If by meddling with the goods he would have become liable to any legal proceeding, it must have been as for a rescous or pound breach. To the former a party is liable only where the goods are wrongfully taken out of the possession of the party distraining before they are impounded, and they must be taken out of his manual possession, *Fitz. N. B.* 102. (F.), *Dod* v. *Monger* (*a*), where it was held, that the distrainer having quitted possession, a retaking of the goods by the tenant was not a rescous.

1828.

SWANN against The Earl of FALMOUTH.

Court held, that the sale was altogether void, and, therefore, gave no right of action to the tenant. So here, if there was no valid seizure, there is no cause of action. At all events the damages were excessive, as no actual loss was proved. (Upon a suggestion from the Court, the plaintiff's counsel consented that the damages should be reduced to 20*l.*)

BAYLEY J. This is not a question between the landlord and a third person, but between him and his tenant; and the points to be considered are, whether, as between them, there ever was a seizure, and whether there was such an abandonment of the distress by the landlord as could have deprived him of the right to treat the tenant as a wrong-doer, had he taken away the goods. The agents of Lord *Falmouth* went upon the premises for the purpose of distraining, and afterwards sent written notice of what they had been doing. That is evidence against the landlord that they had actually made a distress. Then, was the distress abandoned? If it was, no doubt the possession re-vested in the tenant. The statute 11 *G.* 2. *c.* 19. *s.* 10. enables the landlord to "impound, or otherwise secure upon the premises," goods that have been distrained. Then look at the notice delivered by *Jennings*. He says that the goods have been distrained, and unless they are replevied, or the rent paid within five days, they will be appraised and sold. That does not indicate any intention to abandon the distress, but to leave the goods on the premises in the custody of the law. The case of *Dod* v. *Monger* must be considered with reference to the state of the law at the time when it occurred. The landlord, then, had

no

1828.

SWANN against The Earl of FARNBORO.

no right to keep the goods on the premises; if, therefore, he quitted possession of the goods whilst they remained on the premises, that was an abandonment of the distress; but the mere leaving of the goods in a place where he has a right to keep them, without anything to indicate an intention to abandon the distress, cannot operate as an abandonment. It would be very hard upon the tenant if this were otherwise, for then, in all cases of distress by the landlord, upon premises where a man cannot remain in possession, he must immediately remove the goods. In the present case, it could not be expected that the landlord's agent or servant should remain all night upon the wharf; and if that had been necessary in order to retain possession, the goods must have been carried elsewhere, which would have produced a very serious injury to the tenant.

HOLROYD J. The tenant, by asking indulgence, recognised that which had been done as an act of seizure, and was not unlike some cases of arrest where the party submits to it without a corporal touch by the bailiff.

1828.

SWANN *against* The Earl of FALMOUTH.

he neglected to give reasonable notice of it. The rule for a new trial must, therefore, be discharged.

Rule discharged.

Erskine and *Coleridge* were to have opposed the rule.

ELSMORE *against* The Inhabitants of the Hundred of ST. BRIAVELLS.

A building intended for, and constructed as, a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements, Held, not to be a house, outhouse, or barn within the meaning of the stat. 9 *G.* 1. *c.* 22. *s.* 7. so as to entitle the owner to maintain an action against the hundred for an injury sustained by him in consequence of malicious setting fire to the same.

THIS was an action on the statute 9 *G.* 1. *c.* 22. *s.* 7., brought by the plaintiff to recover a satisfaction for the damage sustained by him by reason of the wilful, malicious, and felonious setting fire to his house, outhouse, or barn. Plea, not guilty. At the trial before *Park* J., at the Spring assizes for the county of *Gloucester*, 1828, it appeared that the building of the plaintiff which had been destroyed by fire was in an unfinished state. It contained five rooms, viz., a kitchen and parlour, two rooms on the first floor, and one room over that floor; it had a stone staircase, and all the window-frames were fixed in, and one was glazed. Upon these facts it was contended, that the plaintiff could not recover, because the building was not a house, outhouse, or barn, within the meaning of the statute 9 *G.* 1. *c.* 22. The learned Judge reserved the point, and a verdict was found for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

Russell Serjt., in *Easter* term, obtained a rule nisi for that purpose. In moving for the rule he urged, that by the 9 *G.* 1. *c.* 22. *s.* 7. a party was entitled to recover against the hundred satisfaction for damage sustained by the

1828

ELLMORE against The Inhabitants of ST. BRIAVELLS.

the setting fire to his house, barn, or outhouse, which shall be committed or done by any offender against that act. The setting fire to, therefore, must be an offence against that act. The words of that act (as far as respects the offence of burning) are, "if any person shall set fire to any house, barn, or outhouse, he shall be adjudged guilty of felony, without benefit of clergy." Now a house intended for a dwelling-house, but which has not been completed, and which has never been inhabited, is not a house within the meaning of the legislature. The statute does not alter the nature of the crime (as it existed before), or make any new offence, but excludes the principal from clergy more clearly than he was before, *North*'s case (*a*), *Breeme*'s case (*b*). Then would the maliciously and voluntarily burning of a house intended to be inhabited, but which has never been inhabited, be an offence at common law, with respect to which arson may be committed. Lord *Hale*, in his *Pleas of the Crown*, tit. *Arson*, c. 49. p. 567., speaking of the word *house*, says, "This extendeth, not only to the *very dwelling-house*, but to all outhouses which are parcel thereof, though not contiguous to it, nor under the same roof as in the *case of burglary*." This is an authority to shew

1828.

ELSMORE against The Inhabitants of ST. BRIAVELLS.

son (*a*), and *Rex* v. *Fuller* (*b*) establish clearly that the offence of burglary could not have been committed in respect of a house intended to be inhabited, but which had not been inhabited. Secondly, this is not an outhouse, because it is not parcel of a dwelling-house. *Hiles* v. *The Hundred of Shrewsbury* (*c*), which was an action against the hundred for damage sustained by the maliciously setting on fire of an outhouse, shews that the building burnt must be proved to have been in some degree connected with the dwelling-house to make it parcel thereof, and that it must be such an outhouse in respect of which arson may be committed at common law. Thirdly, this was not a barn in the ordinary acceptation of that term. It was not intended to be used for the purpose for which a barn is used, nor was it constructed in that mode in which a barn is usually constructed.

Talfourd now shewed cause. It must be conceded, that the building was not a house or outhouse within the meaning of the statute; for it must undoubtedly be a house or outhouse in respect of which burglary may have been committed. The authorities establish that, a house built for the purpose of being used as a dwelling-house, but which has never been used as such, is not a house in respect of which burglary can be committed. In *Fuller*'s case, the house was a new one, and finished all but the painting and glazing; a workman, who was employed by the owner, slept in it for the purpose of protecting it; but no part of the owner's family or servants had yet taken possession of it. This

(*a*) 1 *Leach, C. L.* 222. n.
(*b*) 2 *Leach, C. L.* 893.
(*c*) 3 *East*, 457.

was

1828.

Kennedy against Thelwall and others.

was ruled not to be a dwelling-house. But the decision shews that it is not the intended purpose for which a house is built, or the mode of its construction, which makes it a dwelling-house, but the fact of its being inhabited. Now, to apply that principle to this case, the building was intended to be a dwelling-house, but it had been applied to those purposes to which a barn is usually applied. As the actual user of a building for inhabitancy in one instance makes it a dwelling-house, so the user of this building, for the purpose of depositing in it hay and straw (which is the purpose for which a barn is used), makes this a barn.

Russell Serjt. contrà. This building clearly was not a barn within the usual meaning of that term. *Rex* v. *Judd* (*a*), shews that the matter in respect of which the offence is committed, must come within the ordinary and established meaning of the words used in the statute. There the defendant had been committed for setting fire to a parcel of *unthrashed* wheat; and the Court were of opinion, that as the statute had only made it felony to set fire to a *cock*, *mow*, or *stack* of corn, the warrant did not charge the defendant with a felony, and

1828.

ELLISON against The Inhabitants of St. BRIAVELLS.

P.C. c. 49. p. 59., *Rex* v. *Donnavan* (*a*), and *Rex* v. *Winter* (*b*), shew that the statute has been so construed.

Cur. adv. vult.

BAYLEY J. This was an action against the inhabitants of the hundred on the 9 *G.* 1. *c.* 22., brought to recover a satisfaction for the damage sustained by the setting fire to a house, outhouse, or barn. The question is, whether the building which was set fire to comes within the description of a house, outhouse, or barn. It appeared to have been built for the purpose of being used as a dwelling-house, but it was in an unfinished state, and never was inhabited. It was conceded in argument, that it was not a house within the meaning of the statute 9 *G.* 1. *c.* 22. It has been decided that that statute does not alter the nature of the crime, or make any new offence, but merely excludes the principal from clergy more clearly than he was before. There cannot be any doubt that the building in this case was not a house in respect of which burglary or arson could be committed. It was a house intended for residence, but it was not inhabited. It was not, therefore, a dwelling-house, though it was intended to be one. It was not an outhouse, because it was not parcel of a dwelling-house. But it was contended that it was a barn, because it had been used for those purposes for which a barn is used. The building had three stories, chimneys, a staircase, and windows. The plaintiff had deposited in it a quantity of straw and agricultural implements. On consideration, we are of opinion, that this building was not a barn

(*a*) 1 *Leach, C. C.* 81. (*b*) 1 *Russ. & R.* 295.

1828.

Elmore against The Inhabitants of St. Briavelle.

within the meaning of that word, as it is used in this statute. It was a house applied to those purposes to which a barn might be applied. The act of the 9 *G.* 1. c. 22, though remedial in some respects, is in others capitally penal. The hundred are liable to make satisfaction to the party injured by the burning of a house, outhouse, or barn, provided a capital offence be committed against that statute by such burning. The statute, therefore, with reference to a case like the present, must be construed strictly; and, so construing it, we are of opinion, that the building consumed by fire in this case was not a house, outhouse, or barn within the meaning of this act of parliament: and in this opinion Lord *Tenterden*, with whom we have conferred upon this case, concurs. The rule for entering a nonsuit must, therefore, be made absolute.

Rule absolute.

The King *against* The Inhabitants of Hipswell.

1828.

The King against The Inhabitants of Hipswell.

five years, bound by the said *Thomas Salkeld*, by the name of *Joseph Salkeld*, an apprentice to *William Wright*, a chimney-sweeper, under the following indenture: "This indenture, made the 21st day of *May*, in the forty-fourth year of the reign of our sovereign lord *George* the Third, &c. between *Thomas Salkeld*, of *Alston Moor*, in the county of *Cumberland*, yeoman, and *Joseph Salkeld*, his son of the one part, and *William Wright*, of the township of *Hipswell*, chimney-sweeper, of the other part; witnesseth that the said *Joseph Salkeld* hath of his own free will, and with the consent of his said father, put and bound himself apprentice to and with the said *William Wright*, and with him, after the manner of an apprentice, to dwell, remain, and serve from the day of the date hereof, for, during, and until the term of seven years thence next following be fully completed and ended; during all which term the said apprentice his said master well and faithfully shall serve, his secrets shall keep, &c. in the usual form. And the said *William Wright*, the master, in consideration of such service so to be done and performed, doth for himself, his executors, &c. covenant, promise, and grant by these presents, to and with the said *Joseph Salkeld*, the apprentice, that he the said *William Wright*, his executors, &c. shall and will teach, learn, and inform him, the said apprentice, or cause him to be taught, learned, and informed in the art, trade, or mystery of a chimney-sweeper, which the said master now useth, after the best manner of knowledge that he or they may or can, with all circumstances thereunto belonging. And also shall find and provide to and for the said apprentice sufficient and enough of meat, drink, washing, lodging, and clothes, fit and convenient for

1828.

The King against The Inhabitants of Hipswell.

such an apprentice. In case of the master's death within the said term, the apprentice is to be at liberty, and choose a master for himself. And for the true performance of all and singular the covenants and agreements aforesaid, each of the parties aforesaid doth bind himself unto the other firmly by these presents. In witness whereof, the parties above named to these present indentures interchangeably have set their hands and seals the day and year above written." The pauper's husband, *Joseph Miller*, so bound by the said indenture under the name of *Joseph Salkeld*, served under it as an apprentice to the said *William Wright*, during the time specified in the same indenture, in the township of *Hipswell*, where he resided during the same period. And the court of quarter sessions was of opinion that he thereby gained a settlement in that township.

Patteson in support of the order of sessions. The question is, Whether the binding of the pauper's husband was made void by the 28 *G.* 3. *c.* 48. The first section of that statute clearly applies to parish apprentices alone, it prescribes a form for the indenture, and then says, that compulsory bindings in that form shall

1828.

The KING against The Inhabitants of HIPSWELL.

taining, or keeping of any boy or boys as or in the nature of an apprentice or apprentices, or servant or servants employed in the capacity of a climbing-boy or chimney-sweeper, who shall be under the age of eight years as aforesaid, *than is* by this act limited, ordained, and appointed, shall be absolutely void in the law to all intents and purposes." That, as it is printed, is unintelligible, probably the word "otherwise" ought to be inserted before *than*; but still it must be construed with reference to the first section, which applies to parish apprentices only, for various parts of the statute contemplate other bindings as valid besides those specified. [*Bayley* J. What is the title of the act?] "An act for the better regulation of chimney-sweepers and their apprentices," certainly general in its terms, and some parts of the act apply to all apprentices to sweeps. Thus, section 6. gives a general power to justices to hear and determine complaints between the masters and apprentices. Supposing this binding not to be within the statute, it cannot be objected to on the ground that the apprentice was only five years old at the time of the binding. There is not any authority upon this subject, but in *Bro. Abr. Labourers*, pl. 46. it appears to have been considered that five years of age was the limit below which children could not be employed as servants. But supposing the statute does apply, still the indenture was not void, but voidable only, *Rex* v. *St. Nicholas, Ipswich* (*a*), and the service having been performed under it, a settlement was gained.

Alderson, contrà, was stopped by the Court.

(*a*) *Burr. S. C.* 91.

1828.

The King against The Inhabitants of Hitchin.

BAYLEY J. The title of the stat. 28 G. 3. c. 48. is general, "For the better regulation of chimney-sweepers and their apprentices," and the recital is, "That the laws in being respecting masters and apprentices are not sufficient to prevent the complicated miseries to which boys employed in climbing and cleansing chimneys are liable." Then the first section gives the parish officers power to bind under certain circumstances. The second section contains a regulation applicable to parish apprentices. The third enacts, that a particular form of indenture shall be adopted, and this form is equally applicable, whether the binding is by the parish officers or the parents of the child. It is not, however, necessary to decide whether those clauses apply to all bindings, because the fourth and some other sections clearly extend to cases of bindings by parish officers or parents, and reach all bindings or bargains of apprenticeship or service. The fourth section begins by enacting, that all indentures, &c. for binding any boy under eight years of age as an apprentice to a chimney-sweeper, "than is by this act limited," shall be void in the law to all intents and purposes. The words "than is by this act limited," are not sensible;

1828.

The KING *against* The Inhabitants of HIPSWELL.

said contrary to the tenor and true meaning of this act, and being convicted thereof as hereinafter mentioned, shall forfeit and pay for every such apprentice or servant so by him or her had, taken, &c. any sum not exceeding 10*l.*, nor less than 5*l.*" But it is said that *void* is sometimes construed *voidable*, and where the provision is introduced for the benefit of the parties only, such a construction may be right, but where it is introduced for public purposes, and to protect those who are incapable of protecting themselves, it should receive its full force and effect. Here I think it would be contrary to the spirit of the act to consider the indenture voidable only. The consequence is, that no settlement was gained under it.

LITTLEDALE J. concurred.

Order of sessions quashed.

CORNISH and Another *against* JOHN SEARELE.

ASSUMPSIT for use and occupation. Plea, general issue. At the trial before *Littledale* J., at the Spring assizes for the county of *Cornwall*, 1828, the plaintiffs, in order to prove that the defendant held the premises as tenant to them, put in the following document, signed by the defendant, and bearing date the 31st of *January*, 1826, as an acknowledgment by him of that fact: "I do hereby attorn, and become the tenant

A. being tenant of premises under an indenture of lease granted by *B.*, a sequestration issued out of the Court of Chancery against the latter. *A.* then signed the following instrument: — "I hereby attorn, and become the tenant to *C.* and *D.*, two of the sequestrators named in the writ of sequestration issued in the said suit in Chancery, and to hold the same for such time and on such conditions as may be subsequently agreed upon:" Held, that this was an agreement to become tenant, and required a stamp: Held, secondly, that the defendant not having received possession of the premises from *C.* and *D.*, might dispute their title, and that the lease not being proved to have been surrendered, was an answer to the action.

1828.

CORNISH against SEARELL.

of a certain estate and premises called *Goulds*, and also of certain closes of land, and orchard, and premises, called *Cleave* and *Westaway*, situate in *Staverton*, in the county of *Devon*, to *James Cornish* and *Frederick Angel*, two of the sequestrators named in a certain writ of sequestration issued in a certain cause now pending in the Court of Chancery, between *Richard Marshall*, *George Drake*, and *Allen Browne*, plaintiffs, and *Allen Searell*, defendant, and to hold the same for such time, and on such conditions, as may be subsequently agreed on between me and the sequestrators aforesaid." It was objected by the defendant's counsel that this document amounted to an agreement, and required a stamp; and even assuming that it was a mere acknowledgment by the defendant that he had become tenant to the plaintiffs, they as sequestrators having no legal estate in the premises could not maintain this action. The learned Judge reserved the point. The plaintiffs then called a witness, who stated that he, on the part of the plaintiffs, had, in *May* 1826, applied to the defendant for payment of rent, but the latter refused to pay, and in fact never had paid rent to the plaintiffs. The defendant then put in an indenture of lease, dated in *June* 1816, whereby *Allen Searell*, the

original landlord. Here the plaintiffs were strangers, and had no legal title to the land, or to receive the rent. The jury found for the plaintiffs, and that there *was no application for rent in May* 1826. A rule nisi for entering a nonsuit having been obtained by *Wilde* Serjt. in last *Easter* term,

Merewether Serjt. and *R. Bayly* now shewed cause. The instrument in question was a mere acknowledgment of a tenancy subsisting between the defendant and the plaintiffs, and not an agreement. Even if it was an agreement, it was only used to prove an admission of a tenancy, and not as an agreement. It is clear that for collateral purposes an unstamped instrument may be used, *Grey* v. *Smith* (*a*), *Watkins* v. *Hewlett* (*b*). In *Drant* v. *Brown* (*c*) a proposal in writing to let land was accepted by parol: it was held that the proposal itself was admissible in evidence without a stamp. So here the attornment may be considered as a mere proposal by the tenant to take the land, which was afterwards accepted by parol by the plaintiffs. And although the jury have found that there was no *application for rent in May* 1826, the bringing of this action was evidence to shew that the plaintiffs accepted the proposal. Then, as to the lease, there was evidence to shew that at the time when the defendant attorned, the lease was not a subsisting lease, for the defendant undertook by this instrument to hold the premises for such term and upon such conditions as the plaintiffs and he might thereafter agree upon. It must, therefore, be presumed that the lease had been surrendered by act and operation of law.

(*a*) 1 *Campb.* 387. (*b*) 1 *Brod. & B.* 1. (*c*) 3 *B. & C.* 665.

BAYLEY

1828.

CORNISH against SEARELL.

BAYLEY J. I think that the plaintiffs are not entitled to recover. On the 1st of *January* 1826, the defendant held the premises in question under a lease granted by his father, *Allen Searell*, against whom a sequestration issued out of Chancery. The plaintiffs were the sequestrators. The defendant, at the time when this action was brought, must have continued to hold under that lease, unless it had been put an end to by actual surrender by deed, or by act and operation of law. Unless there was evidence to shew that that lease had been surrendered or put an end to, he was liable by law to pay the rent to the lessor according to the covenants in the lease. On the 31st of *January* 1826, the defendant signed the instrument, which it is contended, is an attornment; but which appears to be an agreement or bargain, in distinct terms, between the plaintiffs and the defendant, that the latter should become the tenant to the plaintiffs as sequestrators; and if it be an agreement, then it clearly required a stamp. By the latter part of the instrument, it is stipulated that the defendant shall hold for such time, and on such conditions, as the parties may subsequently agree upon. It has been insisted, that that stipulation was evidence to go to the jury, that the lease was not at that time a subsisting

1828.

CORNISH *against* SEARELL.

But even if there were no lease, I should have great difficulty in saying that the plaintiffs were entitled to maintain this action. The instrument describes the character of the persons to whom the defendant was to become tenant; they are stated to be two of the sequestrators. As sequestrators, they have no legal right to receive the rents. It has been said, that the defendant, having agreed to become tenant to the plaintiffs, cannot dispute their title. If the defendant had received possession from them, he could not have disputed their title. In *Rogers* v. *Pitcher* (*a*), and *Gravener* v. *Woodhouse* (*b*), the distinction is pointed out between the case where a person has actually received possession from one who has no title, and the case where he has merely attorned, by mistake, to one who has no title. In the former case the tenant cannot (except under very special circumstances) dispute the title; in the latter he may. In this case the defendant agreed to become tenant to the plaintiffs as sequestrators. They may have an equitable title to the rent, but not a legal one. And as it appears on the face of the instrument, which the plaintiffs rely upon in support of their claim, that they have no legal right to receive the rent, I incline to think that, independently of the lease, they could not recover in this action. It is unnecessary, however, to decide the case on that ground. I am of opinion, first, that the instrument was not admsisible in evidence for want of a stamp; and, secondly, that as there is no ground for inferring that the lease was put an end to, it was a subsisting lease, and that being so, the father of the defendant was entitled at law to receive the rent. The rule for entering a nonsuit must, therefore, be made absolute.

(*a*) 6 *Taunt.* 202. (*b*) 1 *Bingh.* 38.

HOLROYD

1828.

CORNISH against SEARELL.

HOLROYD J. I think this action cannot be supported. Where the original landlord parts with his estate, and transfers it to another, and the tenant consents to hold of that other, the tenant is said to attorn to the new landlord. The attornment is the act of the tenant's putting one person in the place of another as his landlord. The tenant who has attorned, continues to hold upon the same terms as he held of his former landlord. But here the agreement is for a new tenancy, and is for a time, and upon conditions which may vary from those in the former lease, according to the agreement of the parties. I think, therefore, that this instrument was an agreement, and not a mere attornment, and required a stamp. The plaintiffs are described in the paper which they have given in evidence as sequestrators. As such they have no legal estate. I doubt, therefore, whether, independently of the lease, they could recover for the occupation of the premises by the defendant. In *Frontin* v. *Small* (*a*), a person was empowered by warrant of attorney to execute a deed for another: and it was held, that a lease importing to e made by the lessor, as attorney for another, was void upon the face of it. The former lease is at all events

[redacted]

1828.

CORNISH *against* SEARELL.

defendant should become tenant to the plaintiffs, who had no legal estate in the premises. That is not an attornment. I think, also, the lease would prevent the plaintiffs from recovering in this action. The defendant, by setting up the lease, does not dispute the title of the person by whom he was let into possession, or of any person claiming under him. Besides, by the agreement, the defendant does not recognize the title of the plaintiffs as individuals, but as sequestrators. In that character they can have no legal title to the rent; at all events, the lease being an existing lease, was an answer to the action, inasmuch as it thereby appeared that the title to receive the rent was in a third person.

Rule absolute.

PHILLIPS *against* ALLAN.

A discharge of an insolvent debtor upon a cessio bonorum by the court of session in *Scotland*, is no answer to an action brought by an *English* subject in a court in this country to recover a debt contracted in *England*, although it appeared that the plaintiff opposed the discharge of the defendant in the *Scotch* court.

Semble, That it would have been an answer to the action if the plaintiff had claimed to have the benefit of the *Scotch* law, and to take a distributive share of the property of the insolvent.

DECLARATION by the plaintiff, as drawer, against the defendant, as acceptor of a bill of exchange for 103*l.*, dated *London*, 17th day of *December*, 1821, payable two months after date. Plea, that after the accruing of the several causes of action in the declaration mentioned, and before the commencement of this suit, to wit, on the 4th of *July* 1826, the defendant was a prisoner for debt, at the suit of one *John Sim*, in a certain prison called the *Tolbooth* of *Canongate*, in that part of the United Kingdom called *Scotland*, to wit, at, &c.;

and

1828.

PHILLIPS against ALLAN.

and being so in prison he, defendant, afterwards, to wit, on, &c., at, &c., did present unto the Lords of his Majesty's council and session of that part of the United Kingdom called *Scotland*, a written petition, setting forth that on the 20th of *May* 1826, he, the defendant, was incarcerated in the *Tolbooth*, by virtue of letters of caption, raised at the instance of *Sim*, and that he, defendant, was thereafter arrested in the *Tolbooth*, by virtue of letters of caption at the instance of certain other persons therein named, and that he was continually oppressed, and in danger of being arrested at the instance of other persons thereinafter named, his real or pretended creditors, (naming; among others, the plaintiff,) and also that the inability of him, defendant, to pay his debts, was not occasioned by any fraud in him, but was owing to misfortunes and losses sustained by him, as would, if required, be particularly condescended in the course of that process, and although he had offered to convey his whole effects to his said creditors, yet they refused to accept thereof, or consent to his being set at liberty; and, therefore, that it ought and should be found and declared, by decree of the Lords of council and session, that the inability of him,

[redacted]

persons named in the petition, and others; and that the said Lords of council and session ought to dispense with his, the defendant's, wearing the habit directed to be worn by bankrupts, by any law or practice, or otherwise, after the form and tenour of the laws and daily practice of *Scotland* used and observed in the like cases in all points: whereupon afterwards, to wit, on &c., according to the practice of the court of the Lords of Council, &c., it was ordered that notice should be given to the creditors named in the petition, and, among others, to the plaintiff, to compear before the Lords, &c., at *Edinburgh*, or wherever, &c., the 20th of *June* 1826, to answer at the instance of the defendant, in respect of the matters contained in the petition. Averment, that on, &c., notice was given to the creditors named in the petition, and among others to the plaintiff, to compear as aforesaid, whereupon afterwards, to wit, on, &c., at, &c., the subject-matter of the petition was heard before the Lords, &c., and certain creditors of defendant (and among others the plaintiff) *appeared by counsel, and were heard in opposition to the defendant in respect of the petition*, whereupon it was afterwards adjudged in the said Court that the Lords, &c., found the defendant entitled to the benefit of the process aforesaid, upon lodging in process a disposition of his effects, and also upon making oath in the terms of the acts of sederunt, whereupon defendant, afterwards, to wit, on, &c. lodged in process a disposition of his effects, and also made oath, in terms of the acts of sederunt, and thereupon became entitled to be discharged, and was then discharged out of custody. Averment, that from the time of the imprisonment to the time of the discharge from custody, the plaintiff had no cause of action or demand

what-

1828.

PHILLIPS *against* ALLAN.

whatsoever against the defendant, except the causes of action in the declaration mentioned; that afterwards certain funds, goods, and chattels of the defendant, of the value of 100*l.*, became available, and might have been recovered under the said disposition for the benefit of the creditors of defendant, and for the benefit, among others, of the plaintiff; that all and singular the proceedings aforesaid were pursuant to, and in conformity with, the laws of *Scotland* aforesaid, and that, according to those laws, the said Lords, &c. were competent to act as aforesaid in the premises, &c., whereby, and by the effect of the aforesaid laws, he, the defendant, had become absolutely discharged, in respect of his person, lands, goods, and chattels from the several causes of action aforesaid, and this, &c. Replication, that the causes of action mentioned in the declaration severally accrued to the plaintiff within the kingdom of *England*, and this, &c. Demurrer and joinder.

Barstow in support of the demurrer. Assuming that the court of session in *Scotland* is to be considered a foreign court, it had jurisdiction to adjudicate upon this debt; and having adjudicated upon it, its judgment is binding on the plaintiff, who was a creditor of the defendant, and appeared before that court to oppose his discharge. *Smith* v. *Buchanan* (*a*) will be relied upon by the other side. There it was decided that a discharge under a commission of bankrupt in a foreign country was no bar to an action against the bankrupts for a debt arising here by a creditor, a subject of this country. But in that case the creditor had not taken the benefit

(*a*) 1 *East*, 6.

of

of the commission, or done any act to shew that he had assented to the discharge given to the debtors. It appeared in that case that the defendants had been discharged from their debts by the provisions of a certain law of the state of *Maryland*, on condition of their having relinquished all their property to their creditors. The judgment of Lord *Kenyon* proceeded mainly on the ground that the *English* subject could not be bound by a condition to which he had given no assent, express or implied. Here the plea states that the plaintiff appeared before the *Scotch* court, and was heard in opposition to the defendant in respect of the petition. His appearance in that court shews that he consented to become bound by its judgment, pronounced according to the law of *Scotland*; and that judgment having been that the defendant should be set at liberty, upon his satisfying the condition required by the law of *Scotland*, viz., making the cessio bonorum, the plaintiff is bound by that judgment, and the plea is an answer to the action.

Alderson contrà was stopped by the Court.

BAYLEY J. It has been very properly conceded that a discharge in a foreign country will not of necessity preclude an *English* creditor from suing in an *English* court, in respect of a debt contracted in *England*. It has been decided that a certificate under a commission of bankruptcy issued in *Ireland*, since the Union, does not discharge a debt contracted in *England*, *Lewis* v. *Owen* (*a*). But a discharge of a debt pursuant to the

(*a*) 4 *B.* & *A.* 654.

1828.

PHILLIPS against ALLAN.

provision of an act of parliament of the United Kingdom, which is competent to legislate for every part of the kingdom, and to bind the rights of all persons residing either in *England* or *Scotland*, and which purports to bind subjects in *England* and *Scotland*, operates as a discharge in both countries. In *Sidaway* v. *Hay* (a) this Court decided upon that principle that a debt contracted by a trader residing in *Scotland* was barred in this country by a discharge under a sequestration issued in conformity to the statute 54 *G.* 3. *c.* 157. The defendant in this case was not discharged pursuant to the provisions of that act of parliament. He was discharged on making a cessio bonorum, which, by the law of *Scotland*, operates as a discharge of the person in respect of debts contracted in *Scotland*. The court of session in *Scotland*, primâ facie, is competent only to bind *Scotch* subjects, and to adjudicate in respect of debts contracted in *Scotland*. The plaintiff is an *English* subject, and sues in respect of a debt contracted in *England*. Primâ facie, therefore, he is not bound by the judgment of a court in *Scotland*. But it is insisted that he has sought relief from the *Scotch* court; that he, therefore, by implication consented to be bound by the

had offered to convey his effects to his creditors, and that they (including the plaintiff) had refused to accept such conveyance; and then the prayer was, that he, the defendant, should be set at liberty upon his granting a disposition of all his goods in favour of his creditors, and that in future he should not be incarcerated or troubled for payment of any debts due to the persons named in the petition. The object of the petition, therefore, was, that he should be free from restraint in *Scotland* in respect of those debts. The plea then states, that it was ordered that notice should be given to the creditors named in the petition, and, among others, to the plaintiff, to compear. The object of that notice was that the creditors should have an opportunity of shewing cause why the prayer of the petition should not be granted. It then avers that notice was given to the creditors, and, among others, to the plaintiff; that the subject-matter of the petition was heard, that the plaintiff appeared by counsel, and was heard in opposition to the defendant *in respect of the petition*. It has been insisted that the fact of the plaintiff's having appeared in the *Scotch* court, and there opposed the granting of the prayer of the petition, distinguishes this case from that of *Smith* v. *Buchanan* (*a*), but I think it does not. The plea does not shew that the plaintiff desired to take a distributive share of the defendant's property (which he might have had by the law of *Scotland*), but only that he endeavoured to prevent the defendant's being free from restraint in *Scotland* in respect of his debt. One part of the prayer of the petition was that all judges and law officers might be restrained from molesting the defendant in

(*a*) 1 *East*, 6.

1828.

PHILLIPS *against* ALLAN.

respect of his debts. But for that provision the plaintiff might have sued the defendant in the *Scotch* courts in respect of the debt owing to him. By opposing the defendant, he only shewed that he did not wish to be deprived of the liberty of suing him in the *Scotch* courts. He may have insisted in that court that the defendant was a fraudulent debtor. There was no consent, therefore, of the plaintiff to be bound by the judgment of the *Scotch* court. If he had asked to have the benefit of the *Scotch* law, and to receive a share of the defendant's property, there might have been ground for saying that he had consented to become bound by that law and by the judgment of the *Scotch* court. It seems to me that the debt is a subsisting debt, and that the plaintiff, an *English* creditor, is not prevented from enforcing payment of it in an *English* court of justice.

HOLROYD J. This case falls clearly within the principle of the decision in *Smith* v. *Buchanan*, unless it be distinguishable from that case on the ground that the plaintiff appeared in the court in *Scotland*, and opposed the discharge of the defendant. By the law of *Scotland* the defendant was entitled to be discharged

Scotland by taking a share of the defendant's property, that might have made a difference. He may have appeared in the *Scotch* court for the purpose of objecting to the jurisdiction; and if so, it is quite clear he may now insist that their judgment is a nullity, in the same manner as a party, who has appeared in the spiritual court, may insist that the judgment of that court is void.

LITTLEDALE J. I am of the same opinion. It is admitted that the plea could not be supported, unless it alleged that the plaintiff appeared in the court in *Scotland*: but I think that does not make any difference. If the plea had alleged that the plaintiff sought to avail himself of the law of *Scotland*, by taking a distributive share of the defendant's estate, the case then might have been different. But here the allegation is, that the plaintiff appeared by his counsel, and was heard in opposition to the defendant, in respect of the petition. He may have opposed the prayer of the petition on the ground that the *Scotch* court had no jurisdiction, or that the defendant was not a person entitled, by the law of *Scotland*, to be discharged on making a cessio bonorum. The ground, however, on which the plaintiff opposed the defendant is wholly immaterial, unless he sought relief by availing himself of the *Scotch* law to obtain a distributive share of the defendant's property. The judgment of the Court must be for the plaintiff.

Judgment for the plaintiff.

1828.

PAUL and Others *against* ELIZABETH NURSE and EDMUND NURSE.

Covenant against the assignee of the lessee for non-payment of rent. Plea, that before the rent became due, the defendants assigned all their estate and interest in the demised premises to *A. B.* Replication, that in and by the indenture, the lessee for himself, his executors, administrators, and assigns, covenanted that he, his executors, or administrators should not assign the premises thereby demised without the consent

DECLARATION stated that one *R. Cheatle*, deceased, before the time of making the indenture thereinafter mentioned, was seised in his demesne as of fee of the tenements with the appurtenants thereinafter mentioned to have been demised, to wit, at, &c.; and being so seised on the 30th of *April* 1816, at, &c., by a certain indenture then made between *Cheatle* of the one part, and one *Copeland*, of the other part, *Cheatle*, for the considerations therein mentioned, granted and demised to *Copeland* certain premises, with the appurtenants. Habendum from the 11th *October* 1815, for the term of twenty-one years, at a rent of 80*l.*, payable half-yearly. Covenants by *Copeland*, for payment of rent. Averment, that all the estate, right, title, and interest of *Copeland*, by assignment vested in the defendants, whereby they, as assignees as aforesaid, then entered upon the demised premises, with the appurtenants,

and interest in the demised premises to *Edmund Nurse*, the elder. Replication, that in and by the indenture of lease *Copeland* for himself, his executors, administrators, and assigns covenanted that he, *Copeland*, his executors or administrators, should not assign, underlease, dispose of, or grant any part of the premises thereby demised, to any person, without the consent of *Cheatle*, his heirs, or assigns; that neither *Cheatle*, in his lifetime, nor the plaintiffs, since his death, had given any such consent. General demurrer.

Kelly for the plaintiffs. The question raised by the demurrer to the replication is, Whether a covenant by the lessee, his executors, administrators, and assigns, not to assign, continues in force after the lessor has once given a license to assign? and, if it does, Whether the assignment pleaded by the defendants is not void? If the lease had contained a proviso for re-entry for breach of such a covenant, and an ejectment had been brought, the license to assign would have been an answer to the action, because the condition would thereby have been destroyed. In *Dumpor's* case (*a*) it was held, that the alienation by license to the assignee determined the condition, so that no alienation afterwards made by him could be a breach of the proviso, or give the lessor a right of entry, for the lessors could not dispense with an alienation for one time, and insist that the same estate should remain subject to the proviso after. The reasons given in that case apply to a condition, and not to a covenant. Besides, this rule of law should not be extended, *Doe d. Boscawen* v. *Bliss* (*b*). The question in

(*a*) 4 *Coke*, 119. (*b*) 4 *Taunt*. 735.

1828.

PAUL against NURSE.

this case must be considered as if the cases upon conditions had never been decided. The covenant must be construed according to the intention of the parties. The object of such a covenant is to secure to the landlord a responsible tenant. That intention will be best effectuated by holding that such a covenant will continue in force, so as to have the effect of preventing the tenant at all times from assigning, without the license of the lessor. [*Holroyd* J. The general principle is, that a lessee may assign his interest in the term. But the lessor may restrain the lessee from assigning by proviso or covenant; and if he grants the term, subject to a condition that it shall cease if the lessee assigns, an assignment by the lessee will be void. But if the lessor, as in this case, restrain the lessee from assigning by covenant only, the latter by assigning commits a breach of covenant, but the assignment itself is not void.] Assuming that the assignment is not absolutely void; still as between the plaintiffs and defendants, the latter are estopped from setting up their own breach of covenant as an answer to the action, on the principle that no man can take advantage of his own wrong. [*Holroyd* J. If the obligation to perform such a covenant arises from

1828.

PAUL *against* NURSE.

character of assignees of the estate, which the lessee had under the lease. As soon, therefore, as they ceased to be assignees, their obligation to perform the covenant was at an end. The plaintiffs' remedy is by an action on the covenant not to assign. Besides, it may admit of some doubt whether the defendant is within the covenant; for the lessee only covenants that he, his executors or administrators, will not assign. The judgment of the Court must be for the defendant.

Judgment for the defendant. (*a*)

(*a*) See *Doe dem. Chure* v. *Smith*, 5 *Taunt.* 795.

PAGE *against* NEWMAN.

A suit commenced in K. B. by latitat, may be well continued by a bill of *Middlesex*, sued out by the plaintiff, with intent to implead the defendant for the same causes of action.

DECLARATION on a promissory note of the defendant, dated the 18th of *April* 1814. Plea, that the causes of action mentioned in the declaration did not accrue within six years next before the exhibiting the plaintiff's bill. Replication, that within six years after the several causes of action accrued to the plaintiff, to wit, on the 30th of *June* 1819, in the 59 *G.* 3., he, plaintiff, for recovery of his damages sustained by him, by reason of the not performing the several promises and undertakings in the said declaration mentioned, sued out a latitat, (whereby, after reciting a previous bill of *Middlesex* commanding the sheriff of that county to take the defendant and him safely keep, so that he might have his body to answer the plaintiff in a plea of trespass, and also to a bill of the plaintiff to be exhibited against the defendant for 300*l.*, upon promises, and a return thereto of non est inventus;) the King commanded the sheriff of *Kent* to take the defendant, &c.

1828.

PAGE against NEWMAN.

&c. to answer the plaintiff in the plea, and the bill aforesaid. It then set out a return of non est inventus, and the non-appearance of the defendant, and then stated that the plaintiff prayed another latitat to the sheriff of *Kent*, returnable on *Monday* next after eight days of *St. Hilary*, for the defendant to answer in the plea and to the bill aforesaid; and that on that day in the court of King's Bench at *Westminster*, came the plaintiff, by his attorney aforesaid, and offered himself against the defendant in the plea and bill aforesaid; and the sheriff of *Kent* did not send the last-mentioned writ, nor did he do any thing thereupon, nor did the defendant come or appear in the court of King's Bench, according to the exigency of the said writ. The replication, after stating similar continuances from term to term to *Easter* term 1826, proceeded thus: — Wherefore the plaintiff, for recovery of his damages by him sustained by reason of the not performing of the said promises and undertakings in the said declaration mentioned, prayed *another* precept, called a bill of *Middlesex*, against the defendant in form aforesaid, and it was granted to him, returnable before our lord the now King at *Westminster*, on *Friday* next after the morrow of the *Holy Trinity*, for the

the said several causes of action in the said declaration mentioned, &c. And the plaintiff afterwards, in *Trinity* term in the 7 *G.* 4., exhibited his bill, and declared thereon against the defendant, to wit, at, &c. Averment, that the said several causes of action did accrue to the plaintiff within six years before the issuing of the first-mentioned writ, in manner and form, &c. Rejoinder, that no precept, called a bill of *Middlesex*, against the defendant was sued out or prosecuted by the plaintiff, previously to the said prayer of the plaintiff of another precept called a bill of *Middlesex*, and so sued and prosecuted by plaintiff against the defendant, as in the replication was mentioned. And this, &c. Demurrer.

Reader for the plaintiff. It has been decided that a latitat without a bill of *Middlesex*, if properly issued and continued on the roll, is a good commencement of the suit to avoid a plea of the statute of limitations, *Coles* v. *Sibsye* (*a*). It is in the nature of an original writ, *Davey* v. *Clinch* (*b*), *Culliford* v. *Blandford* (*c*), *Brown* v. *Babington* (*d*), *Wood* v. *Newton* (*e*), and *Foster* v. *Bonner* (*f*). Then, if the latitat was a good commencement of the action, the rejoinder, which states that no bill of *Middlesex* was sued out in the first instance, is bad; and that being so, the next question which arises upon the replication is, Whether the bill of *Middlesex* sued out after the last latitat is a good continuance of the suit. Now it is possible that the plaintiff could not have adopted any other course. If the defendant were

(*a*) *Styles*, 156.
(*b*) 1 *Sid.* 53.
(*c*) *Carth.* 233.
(*d*) 2 *Ld. Raym.* 882.
(*e*) 1 *Wils.* 141.
(*f*) *Cowp.* 454.

in

1828.

PAGE against NEWMAN.

in *Middlesex*, no other process could reach him, for the service of a latitat in *Middlesex* is irregular, *Price* v. *Jackson* (*a*). Suppose a bill of *Middlesex* to have been actually sued out in the first instance, and that the defendant had gone into *Kent*, or any other county, and a latitat had been issued into such county, and the defendant had returned into *Middlesex*, it is quite clear that another bill of *Middlesex* might have been sued out, and that it would have been a good continuance of the same suit, and not a commencement of another suit. Now, every latitat presupposes a previous bill of *Middlesex*. If the latitat be a good commencement of the action, a bill of *Middlesex* with intent to follow up the suit commenced must be a good continuance of that suit. The process is of the same description, and it is sufficient to shew that the plaintiff is proceeding to bring the defendant into Court in the suit originally commenced. Besides, this at most is a mere irregularity. In *Karver* v. *James* (*b*), it was decided that a process voidable by reason of its being returnable on a common return-day, and not on a day certain, was sufficient to avoid the statute. In *Lord Middleton* v. *Forbes* (*c*) it was holden, that a writ sued out by a

afterwards continued by latitat, it might be subsequently continued by a bill of *Middlesex*. But the demurrer admits that no bill of *Middlesex* was sued out before the last latitat issued, and the only question raised in this case is, Whether a bill of *Middlesex* is a good continuance of a suit commenced by latitat, without any previous bill of *Middlesex?* Although it must be conceded that an action may be well commenced by latitat, yet the more regular course would be, first, to sue out a bill of *Middlesex*. Every latitat recites that a bill of *Middlesex* has issued, and that the sheriff of *Middlesex* has returned non est inventus. A bill of *Middlesex*, therefore, is, primâ facie, the first process in a suit, a latitat the second. The issuing of a bill of *Middlesex*, primâ facie, imports the commencement of a new suit, and not the continuance of one. The latitat and bill of *Middlesex* are kept on distinct rolls. If the latitat had been shewn to have issued in a suit in which a bill of *Middlesex* had first issued, it might well have been continued by the latter. [*Bayley* J. If the defendant had been in *Kent* at the time when the first latitat issued, and he had afterwards removed into *Middlesex*, would not a bill of *Middlesex* have been a good continuance of the suit commenced by latitat?] No such facts are stated upon this record, and they are not to be assumed. No sufficient cause is alleged for varying the process. The bill of *Middlesex*, therefore, must be taken upon this record to be the commencement of a new suit, and not the continuance of one already commenced by latitat.

BAYLEY J. I have no doubt that the bill of *Middlesex* was in this case a good continuance of the suit which had been commenced by latitat. It has been decided, that

1828.

PAGE *against* NEWMAN.

that a latitat is a good commencement of a suit. To continue a suit, the process by which the party is ultimately brought into court, must be of the same description as that which was originally sued out. A bill of *Middlesex* and a latitat are process of the same kind. The court, in virtue of its jurisdiction in the county where it sits, issues against parties resident in that county a bill of *Middlesex*. If the defendant be not found in the county of *Middlesex*, the court issues a latitat into some other county. The latitat issues, therefore, on the supposition that a bill of *Middlesex* has previously been issued, and that the defendant has not been found in that county. The replication in this case sets out a latitat, whereby (after reciting that a bill of *Middlesex* had issued, whereby the sheriff of that county was commanded to take the defendant, &c. &c. to answer the plaintiff in a plea of trespass, and to a bill to be exhibited against him,) the King commanded the sheriff of *Kent* to take the defendant, &c. to answer the plaintiff in the plea and bill aforesaid; and by the latitat subsequently issued from term to term, and the bill of *Middlesex* issued in *Easter* term 1826, the defendant is called upon to answer the plaintiff in the plea and the

action in the declaration mentioned. It must be taken, that the bill of *Middlesex* and the latitat were issued with the intent to prosecute the same causes of action. The defendant by the rejoinder, alleges, that no bill of *Middlesex* was sued out by the plaintiff before that which issued after the last latitat. But it having been decided, that a suit may be well commenced by a latitat without a previous bill of *Middlesex*, the fact stated in the rejoinder is wholly immaterial. The rejoinder, therefore, is no answer to the replication. I think the replication is good. A suit commenced by latitat may be continued by process of the like kind. A bill of *Middlesex* and a latitat are processes of the same kind; for they are frequently issued in the same suit: and one instance has been put in argument, where a bill of *Middlesex* would of necessity be the only process by which a suit commenced by latitat could be continued. It is clear, therefore, that a bill of *Middlesex* may be a good continuance of such a suit. And as it appears by the replication that it was sued out with the intent to implead the defendant for the same causes of action as those for which the latitat was sued out, I think that in this case it was a good continuance of the suit. I am, therefore, of opinion, that the suit which was originally commenced by latitat was properly continued by the bill of *Middlesex*, and, consequently, that the plaintiff is entitled to the judgment of the Court.

Judgment for the plaintiff.

1828.

HUBBARD *against* WILKINSON.

A defendant having been arrested, paid into court the sum indorsed on the writ, together with 20*l.*, as a security for costs, pursuant to the stat. 7 & 8 *G.* 4. *c.* 71. *s.* 2. The Court, on the application of the defendant, allowed the plaintiff to take out of court a given portion of the sum paid into court, and unless he consented to accept thereof, with costs, in full discharge of the action, ordered it to be struck out of the declaration, and that the plaintiff should not give any

THE defendant in this suit having been arrested for a debt of 70*l.*, instead of putting in and perfecting bail, paid into Court that sum (being the sum indorsed on the writ), together with 20*l.* as a security for the costs in the cause, pursuant to the statute 7 & 8 *G.* 4. *c.* 71. *s.* 2.

Richards in *Easter* term last moved, on the part of the defendant, for a rule that the plaintiff should be at liberty to take out of Court 65*l.*, (part of the above sum,) and that unless the plaintiff should accept thereof with costs in full discharge of this action, the sum of 65*l.* should be struck out of the declaration, and, upon the trial of the issue, the plaintiff should not be permitted to give evidence for the sum of 65*l.*

The Court, after some hesitation, granted the rule, and in the course of *Trinity* term the same was made

1828.

DOE on the several demises of CHARLES PRIDEAUX BRUNE and EDWARD COODE *against* WILLIAM MARTYN the younger.

By marriage settlements between *W. M.* and *T. M.*, son and heir apparent of *W. M.*,

EJECTMENT for the recovery of certain lands in the parish of *Padstow*, in the county of *Cornwall*. At the trial before *Burrough* J., at the *Lent* assizes for

of the first part; *J. H.* and *Mary H.* of the second part; and *L. G.* and *J. H.*, trustees, of the third part; *W. M.* and *T. M.* bargained and sold to the trustees certain lands called *Ninnisses* and *Sandry's Fields*, and other lands called *Varwell*, then in possession of *W. M.* and *T. M.*, to hold unto the trustees, their heirs and assigns, as to *Sandry's Fields* and *Ninnisses*, to the use of *W. M.* for life; remainder to the use of the trustees during the life of *W. M.* upon trust to preserve contingent remainders, with remainder to the use of the said *T. M.* for life, remainder to the said trustees and their heirs during the life of *T. M.* upon trust to preserve contingent remainders, with remainder to the first and other sons of *T. M.* by *M. H.* successively in tail male, with remainder to the use of the right heirs male of *T. M.* for ever; and as to all the other settled premises to the use of *T. M.* for life, with remainder to the use of trustees, their heirs and assigns, during the life of *T. M.*, in trust to preserve contingent remainders, with remainder to the use of *M. H.* for her life, for raising out of the rents and profits an annuity of 25*l.* per annum, and subject thereto to the use of the first and other sons of *T. M.* by *M. H.* successively in tail male, with remainder for want of issue male by *T. M.* on the body of *M. H.* begotten; or if such issue male should die without issue male, and *T. M.* should have any daughter or daughters by *M. H.* at the time of his death, then that the trustees, their heirs and assigns, should stand seised of the said hereditaments to the use of the issue female of *T. M.* by *M. H.*, for raising portions as therein mentioned to such daughter and daughters; and that until twenty-one the trustees and their heirs should out of the rents raise such maintenance of such daughter and daughters as to the trustees should seem meet, and after raising the said sums for the maintenance for such daughter and daughters as aforesaid, or in default of issue female, to the use of the right heirs *male* of *T. M.* for ever: Held,

First, that the last words were words of limitation and not of purchase, and that *T. M.* took the ultimate remainder in fee; and,

Secondly, if they were words of purchase still they would create a contingent remainder during the life of *T. M.*, which would vest immediately upon his death in his heir, who might devise the same.

Thirdly, that by the limitation as to the *Varwell* and *Crugmere Closes*, the trustees took an estate only during the infancy of the daughters; and,

Fourthly, even if they took a fee, it was a fee determinable when the portions should have been raised; and twenty years of possession adverse to their claim having occurred, the presumption was, that the right of the trustees had been released and satisfied.

W. M. died leaving two sons, who died without issue. The survivor of them devised the estate to his wife for life, remainder to all and every the children of *Richard E.* and *M. P.* who should be living at the time of his wife's death. There were living at her death nine children of *R. E.* and *M. P.* Of these, two during her life, and while their estates remained contingent, had levied fines sur conusance de droit come ceo of their shares. In *April* 1824 *A. B.* entered upon the lands comprised in the marriage settlement, and kept possession, and in *May* 1824 all the children of *R. E.* and *M. P.* by lease and release conveyed the lands comprised in the marriage settlement in given proportions to a purchaser: Held, that the children of *R. E.* and *M. P.* might convey their interests without having first made any entry into the land, although *A. B.* was in possession.

Secondly, as to the shares of the two who had levied fines while their estates were contingent, that their interest was not thereby extinguished.

1828.

Doe dem. Brunt against Martyn.

that county in 1825, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case: —

By indentures of lease and release, dated the 5th and 6th of *November* 1722, the release being tripartite, and made between *William Martyn*, Gent. and *Thomas Martyn*, Gent. son and heir apparent of the said *W. Martyn*, of the first part, *Jenefer Hooper*, widow, and *Martha Hooper*, her daughter, of the second part, and *Lawrence Growden*, Gent. and *John Hooper*, Gent. of the third part, in consideration of a marriage then intended between said *Thomas Martyn* and said *Martha Hooper*, and of the marriage portion of *Martha Hooper*, and for securing to her a competent jointure, and for limiting the said hereditaments thereinafter mentioned; and in consideration of 10*s.*, *W. Martyn* and *T. Martyn* did grant, bargain, sell, alien and enfeoff, remise, release, convey, assure and confirm unto the said *L. Growden* and *John Hooper* one field called *Ninnisses*, in the village of *Tretor*, in *Padstow*, two fields called *Sandry's Fields*, lying in the village and fields of *Crugmere*, in *Padstow*, and divers other fields, amongst which were some called the *Varwell Closes* in *Crugmere*, in *Pad-*

1828.

Doe dem. Brune against Martyn.

to the use of the said trustees and their heirs during the life of the said *Thomas Martyn*, upon trust to preserve contingent remainders, with remainder to the use of the first, second, third, &c. and other sons of the said *Thomas Martyn* by the said *Martha Hooper* successively in tail male, with remainder to the use of the right heirs male of *Thomas Martyn* for ever. And as to all other of the said settled premises, to the use of *Thomas Martyn* for life, with remainder to the use of the trustees, their heirs, and assigns, during the life of *Thomas Martyn*, in trust to preserve contingent remainders, with remainder to the use of *Martha Hooper* for her life, for raising out of the rents and profits an annuity of 25*l.* and subject thereto, to the use of the first, second, third, and other sons of *Thomas Martyn* by *Martha Hooper* successively in tail male, with remainder for want of male issue by *Thomas Martyn* on the body of *Martha Hooper*, or if such issue male should die without issue male, and *Thomas Martyn* should have any daughter or daughters on the body of *Martha Hooper* lawfully begotten and living at the time of his death; then that *Lawrence Growden* and *John Hooper*, their heirs and assigns, should stand and be seised of the said hereditaments to the use and behoof of the issue female of *Thomas Martyn* on the body of *Martha Hooper*, for raising and levying out of the rents, issues, and profits thereof such sum and sums of money to pay and satisfy such portion and portions to and with such daughter and daughters at such time and times as are hereinafter mentioned, that is to say, if one daughter, the sum of 600*l.*, and if two daughters, to each of them the sum of 400*l.*, and if more than two daughters, the sum of 800*l.* to be equally divided between them at

1828.

Doe dem. Baker against Martyn.

twenty-one; but if it should happen that the said sums and sum aforesaid could not be advanced and risen by and out of the profits of the said hereditaments at the times of payment thereof as aforesaid, then and notwithstanding the said premises should stand and be charged with the payment of the portion or portions aforesaid, when and as soon after as the same could be advanced and raised out of the rents, issues, and profits thereof. And that until twenty-one the trustees and their heirs, and the survivor of them and his heirs, should, out of the rents, raise such maintenance of such daughter and daughters as to the said trustees, their heirs, and assigns should seem meet and convenient. Proviso, that if such daughters should marry without consent, or the said *Thomas Martyn* should by deed or will revoke the said portions, the same portions should go to such other persons as the said *Thomas Martyn* should direct. And from and after raising, levying, and paying of the sum and sums of money as aforesaid to and for the maintenance and education and portion to, for, and with such daughter and daughters as aforesaid, or for default of issue female, to the use and behoof of the right heirs male of the said *Thomas Martyn* for ever,

1828.

Doe dem. Brune against Martyn.

after the death of his brother *William*, entered into the premises and continued in possession of them till 1795, when he died, leaving no issue. The only other issue of *Thomas Martyn*, the settlor, were *Martha Martyn* and *Grace Martyn*. *Martha* died in 1793, unmarried, and without issue. *Grace* married *James Elliott*, who died in 1761, leaving the following issue: — 1st, *Thomas Elliott*; 2d, *Richard Elliott*, who married *Agnes Best*; 3d, *Martha Elliott*, who married *Parnall*. *Richard Elliott* had three children: 1st, *W. M. Elliott*; 2d, *Agnes Elliott*, who married *Joseph Martin*; 3d, *Grace Elliott*. *Martha Parnall* had several children: 1st, *William Parnall*; 2d, *Andrew Parnall*; 3d, *John Parnall*; 4th, *Grace Parnall*, who married *Samuel Thomas*; 5th, *Edward Parnall*; 6th, *Mary Parnall*. On the 26th *September* 1795, *Hooper Martyn* made his will in writing, duly executed according to the statute of frauds, bearing date the day and year last aforesaid, by which he devised all the premises in question to his wife *Peggy* (afterwards, by her second marriage, called *Peggy Hoblyn*) for life, with remainder to all and every the son and sons, daughter and daughters, of his nephew *Richard Elliott*, and of his niece *Martha Parnall*, who should be living at the time of the decease of his said wife, share and share alike, as tenants in common, and not as joint-tenants, and to their heirs and assigns for ever. *Peggy Hoblyn* died 12th *March* 1824, and at the time of her death the issue of *Richard Elliott* and *Martha Parnall* then alive and entitled (if by law they might be so entitled) to take under *Hooper Martyn*'s will, were the several persons above named. No evidence was given of the actual raising of the sums directed to be raised by the settlement of 1722 for the benefit of the female issue,

1828.

Doe dem. Brune against Martyn.

and charged on part of the premises in question, but on the death of *Hooper Martyn*, his widow and devisee as aforesaid took possession of all the premises, and continued in the enjoyment of them from that time without interruption, except as hereinafter mentioned. For some time previously to *Michaelmas* 1822, one *Hawken* had been tenant, to Mr. and Mrs. *Hobbyn*, of the closes called *Ninnisses* and *Sandry's Fields*, but his tenancy ended at that time; and shortly before he quitted possession he was served with the following notice, signed by the defendant's father: — "Whereas I claim to be owner and proprietor of all those fields called *Sanders* or *Sandry's Fields*, and *Ninnisses Park*, situate within the parish of *Padstow*, in the county of *Cornwall*, which you now occupy at an annual rent: now I do hereby give you notice, that I intend to institute legal proceedings for the recovery thereof; and further, that you are not to pay any rent which now is, or hereafter may accrue, due, for the same to any person or persons whomsoever, without my knowledge and consent. Dated this 3d day of *June* 1822." Shortly after *Hawken* had quitted these premises the defendant's father went to all the closes, claiming to enter as lawful heir, to take pos-

1828.

Doe dem. Brune against Martyn.

time. After *Michaelmas* 1824 the defendant paid the reeve of the manor of *Trevose*, one year's chief rent for *Sandry's Fields* and the *Varwell's* parcel of the premises in question due to the said manor.

By indentures of lease and release, bearing date the 6th and 7th of *May* 1824, the children of *Richard Elliott* and *Martha Parnall* living at the time of *Peggy Hoblyn's* death, (the husbands of the married female children being parties to the deeds,) conveyed their interest to the lessors of the plaintiff. These deeds recited several former conveyances, and, amongst others, deeds of lease and release, and a fine sur conusance de droit, &c. by *Joseph Martyn* and *Agnes* his wife, formerly *Agnes Elliott*, unto *Edward Coode* and his heirs, of *Michaelmas* term, 48 *G.* 3., and lease and release and a fine sur conusance de droit comme ceo by *Samuel Thomas* and *Grace his wife*, formerly *Grace Parnall*, to the said *Edward Coode*, of *Trinity* term, 54 *G.* 3.

In *Trinity* term 1824 a fine was levied in pursuance of a warrant contained in the deed of *May* 1824; and the third proclamation was in *Hilary* term 1825.

The declaration contained two demises of the same date, viz. the 1st of *September* 1824, the first by *C. P. Brune*, and the second by *Edward Coode*, and the premises sought to be recovered were *Ninnisses*, *Sandry's Fields*, and the *Varwell Closes* in *Crugmere*. This case was argued at the sittings in banc, after last *Easter* term, by

Preston for the lessors of the plaintiff. According to the general rules of law, and the rule in *Shelly's* case (*a*),

(*a*) 1 *Co.* 93.

 wherever

1828.

Doe dem. Brune against Martyn.

wherever an estate for life is given to the ancestor with a limitation to his heirs in any way, the two estates unite, and, therefore, in this case the estate for life given to *T. Martyn* by the settlement united with the ultimate remainder to his right heirs male, and became either an estate in tail or in fee to him and his male heirs. For want of words of procreation it was not an estate tail; if an estate in fee the word *male* must be rejected, for no one can create a new rule of descent, and then it was an estate in fee-simple, Lord *Ossulston*'s case (*a*), *Dawes* v. *Ferrers* (*b*), where Lord *Macclesfield* said he would not allow the bar to dispute what was the foundation and land-mark of the law, viz. that under such circumstances the word *male* must be rejected, and the estate given to the heir general. Under that settlement, then, *Hooper Martyn* had a vested remainder in fee at the time when his will was made, and under his devisees the lessors of the plaintiff claim. This applies equally to all the property; for although the second division of it was given to trustees and their heirs to the use of the issue female for certain purposes, it must be presumed that those purposes have been long since answered. The only point that can be made for the defendant is,

1828.

Doe dem. BRUNE against MARTYN.

droit come ceo, conveyed their shares to the lessor of the plaintiff, and, therefore, he has a title by estoppel to those two shares prior to any title by estoppel which the defendant can in any way set up, *Helps* v. *Hereford* (*a*). However, as there was no disseisin by the defendant, his argument as to the estoppel is unavailing.

Farquhar Fraser contrà. The words "heirs male," in the ultimate remainder in the settlement of 1722, are words of purchase. It must be admitted, that the rule in *Shelly's* case is not to be dispensed with, unless there is a clear intent to make use of the latter words as words of purchase. But *Fearne* (*b*) says, "Some instances there are even in cases at common law wherein the subsequent limitation to the heirs of the body has been so qualified and corrected by other additional words, as to amount to words of purchase and not of limitation." And they were held to be words of purchase in *Waker* v. *Snowe* (*c*), and *Lisle* v. *Gray* (*d*), inasmuch as it was presumed that the parties intended to use them in that sense. Now, here these words cannot create an estate tail for want of words of procreation, neither can they create an estate in fee, unless the word *male* be rejected, and no word ought to be rejected if a sensible meaning can be given to it. By construing these as words of purchase, they will bear a sensible meaning, and the ultimate declaration of an intention to keep the estate in the family and name of *Martyn* shews that to be the true meaning in which they were used. If so, at the date of *Hooper Martyn's* will this remainder was contingent,

(*a*) 2 *B. & A.* 242.
(*b*) *Contin. Rem.* 148. 6th ed.
(*c*) *Palmer*, 359.
(*d*) 2 *Lev.* 223.

1826.

Doe dem. Burne against Martyn.

tingent, and, therefore, could not be devised. [*Bayley* J. Suppose these to be words of purchase, and that there is no person answering the description, then is not the effect the same as if they had not been in the deed?] The remainder was contingent until the death of the particular tenant for life, and if at that time there was no person answering to them, the estate would descend to the heir of the settlor. But in this case *Thomas Elliott* is the heir general, and there is no demise by him. [*Bayley* J. If by will an estate is given to *A.* for life, remainder to *B.* in fee if he be living at his death, on the testator's death would any thing descend to his heir, or what would become of the fee?] It would be in abeyance, and would not descend to the heir liable to be divested on the happening of the contingency. [*Bayley* J. According to *Purefoy* v. *Rogers* (*a*), the fee would not be in abeyance, but in this case would be in *Hooper Martyn*, and by him devisable.] That question was only on a devise, and not on a settlement by lease and release. But supposing this point to be in favour of the lessor of the plaintiff as to the *Ninnisses* and *Sandry's Field*, it does not affect the residue of the property which was settled to different uses. In those

[redacted]

1828.

Doe dem. Brune against Martyn.

there is no definite period at which the estate was to cease, they, therefore, took the fee, *Doe* v. *Willan* (*a*). If the trustees took only a chattel interest, it is not stated that the portions have been raised, and that should be decided by a jury; the Court will not make the presumption, *Doe* v. *Passingham* (*b*). In the next place, it cannot be denied that the interests created by *Hooper Martyn*'s will subsequent to the death of *Peggy Hoblyn* were contingent, and such an interest cannot be assigned at law, *Lampet*'s case (*c*), although according to the words of the statute of wills it may be devised, *Doe* v. *Tomkinson* (*d*). If so, the lease and release by *Agnes Elliott* and *Grace Thomas* conveyed no estate. Neither did the fines give any title, but on the contrary, they operate as an extinguishment of the contingent interest of those two persons, *Buckler*'s case (*e*), *Weale* v. *Lower* (*f*). [*Bayley* J. It was there held that the fine operated by way of estoppel.] That was a fine sur concessit, and the fifth resolution is express, that if it had been levied in fee it would have destroyed the contingent use. In *Vick* v. *Edwards* (*g*), Lord *Talbot* says, that a fine levied of a contingent interest will pass a good title by way of estoppel, but he does not mention the species of fine; and as he refers to *Weale* v. *Lower*, probably a fine sur concessit must have been meant. This is explained in the fourth resolution in *Weale* v. *Lower*, where it is said, "A fine was levied sur concessit for years; it did not displace the fee; and when that vested it fed the estoppel, and then the estate by

(*a*) 2 *B.* & *A.* 84.
(*b*) 6 *B.* & *C.* 305.
(*c*) 10 *Co.* 46. et *ib.* note (D).
(*d*) 2 *M.* & *S.* 165.
(*e*) 2 *Co.* 56. 6th resolution.
(*f*) *Pollexf.* 54.
(*g*) 3 *P. Wms.* 372.

estoppel

1828.

Doe dem. Brune against Martyn.

estoppel became an estate in interest, and was the same as if the contingency had happened before the fine was levied." *Helps* v. *Hereford* (*a*), cited on the other side, is distinguishable. There, while the fee-simple was in the ancestor, the heir conveyed by fine. It could only operate by estoppel. The heir had no interest to convey. It was, therefore, like the common case of a deed between two parties; the one professing to convey having no interest, it works by estoppel. Here, however, the party to the fine had an interest devisable or descendible, although not assignable. *Davies* v. *Bush* (*b*), and *Tyrrel* v. *Marsh* (*c*), are exceptions from the general rule, and merely decide that a fine will not have the effect of extinguishing powers where that appears to be contrary to the intention of the parties. [*Bayley* J. The fine in this case clearly was not levied for the purpose of extinguishing the interest.] Neither could that intent be supposed to exist in any of the cases where it has been held so to operate. Lastly, as no entry was made by the devisees of *Hooper Martyn* after the death of his widow, no conveyance of their interest could be made, and in the declaration there is no demise by them. [*Bayley* J. If they could demise for the purpose of bring-

and sale enrolled, nor other conveyance, doth avoid an estate by wrong, and reduce clearly the estate of the feoffor and make a perfect tenant of the freehold, but only livery of seisin upon the land;" and *Butcher* v. *Butcher* (*a*) confirms this view of the case.

Preston in reply. The first point made for the defendant is clearly answered by Lord *Ossulston*'s case, and *Counden* v. *Clerke* (*b*), which shews that where the words "heirs male" have been treated as words of purchase, it has been held necessary that the party claiming to take under them should be both heir and male. If they are meant to point out a special heir, that can only be in case of an estate tail, which this clearly was not. As to the second point, whatever was undisposed of by the settlement was not in abeyance, but vested in the heir of *Thomas Martyn*, until it could vest according to that deed, and in the mean time was grantable or devisable. *Hooper Martyn*, the heir, did devise it, and under that devise the lessors of the plaintiff claim. The third point was applicable to those parts of the estate in which the issue female were interested. It is contended that the trustees took the fee, but there are no words to warrant that construction. The use is limited to the issue female, and the legal estate was executed in them by the statute. Then the trustees were, for one purpose, to receive the rents, that, however, only gives a chattel interest, *Jemmott* v. *Cooley* (*c*). It is a common case that an estate should be holden by a party and his heirs until, &c. and that is not a fee. Their estate was at all events to

(*a*) 7 *B.* & *C.* 399. (*b*) *Hob.* 29. (*c*) 1 *Lev.* 170.

cease

1828.

Doe dem. Bevan against Martyn.

cease when the daughters attained twenty-one, and as it could not in any event become absolute it was not a fee. Even if the trustees had taken a fee, the argument founded on the principle that no estate can be limited after a fee would not be applicable, for that principle does not affect wills or conveyances to uses. Then as to the conveyance by the devisees of *Hooper Martyn*, they had not any grantable or assignable interest, nor was it devisable or releasable, *Leake* v. *Robinson* (*a*), *Jee* v. *Audley* (*b*), it could, therefore, only be bound by estoppel, and in that mode the lease and release and fine by them operated. With respect to the destruction of the contingent interest by the fine, *Davies* v. *Bush* is expressly in point that it would not have that effect. The case of disseisin put in *Buckler's* case is wholly different. There the disseisor had the seisin, the disseisee had only a right, and the law will not allow a right to be parted with, and even that case was denied in *March*, 66. The point put in *Weale* v. *Lower* related to the case of a contingent remainder to a party ascertained, and it was an obiter dictum not necessary to the decision of the case then before the Court. But supposing the estate was not grantable after the death of

1828.

Doe dem. BRUNE against MARTYN.

effect of the limitation to the use of the right heirs male of *Thomas Martyn?* whether those words are words of limitation or words of purchase? It was conceded, and rightly, by Mr. *Fraser*, that they were to be taken as words of limitation, unless a contrary intention was manifest. But he contended that a contrary intention was manifest, and that the limitations looked to such person as should be heir male of *Thomas Martyn* at the time the preceding estates should fail. I cannot see any such contrary intention. Were I at liberty to conjecture, the opinion I should form would be, not that the settlor was looking to any particular individual, or meant to make an object of his bounty any individual who at a distant indefinite time might fill the character of heir male, but that he meant to create a general estate in tail male in himself, and that he unintentionally omitted the words to shew of whose body they were to be heirs male. The consequence of this would be, that these would be words of limitation, that the word "male" must be rejected, and that under these words *Thomas* took immediately the ultimate remainder in fee.

But suppose these to be words of purchase, would it bar the lessors of the plaintiff? Upon the execution of the deed this would be a contingent remainder, because nemo est hæres viventis, and during the life of *Thomas Martyn*, no one could be his heir or heir male. But why should it not vest the instant *Thomas Martyn* died? The law leans to the vesting of estates; and as soon as a person comes in esse who fills the character to which a given remainder looks, that remainder vests, unless there is something to shew an intention that it should not then vest. Is there any thing to shew such an intention here? The limitation is not

specially

1828.

Doe dem. Brune against Martyn.

specially to the *then* right heirs male of *Thomas Martyn*, or to such persons as shall *then* be such heirs male, but generally, to the right heirs male of *Thomas Martyn*. As soon, then, as any person filled that character, and answered that description, that remainder vested in interest. Upon the death of *Thomas Martyn* in 1740, the remainder vested in *William*, who was then his heir, and on *William*'s death in 1779, the remainder descended in fee upon *Hooper*, and he had therefore power to make a will.

The next question applies, not to the whole estate, but to that property only which is included in the second branch of the settlement, viz. the *Varwell Closes* and the property in *Crugmere*. This question is, whether the limitation to the trustees to the use of the issues female of *Thomas Martyn* vests the whole fee in the trustees so as to prevent the persons who claim under the ultimate remainder from having any claim at law. The limitation is, that for want of issue male of *Thomas Martyn* by *Martha Hooper*, or if such issue should die without issue male, and *Thomas Martyn* should have a daughter or daughters by *Martha Hooper* living at his death, then the trustees, their

1828.

Doe dem. Brune against Martyn.

trustees and their heirs were to raise such maintenance for the daughters as they should think meet. The trustees, therefore, have no express power given them over the rents except during the infancy of the daughters. Upon the daughters attaining twenty-one, the use seems executed in the daughters, and it is to them, and to them only, the control appears to be given over the rents, issues, and profits. Suppose, however, that the legal estate vested in the trustees, and that the 600*l.* or 800*l.* in the events which happened were to have been raised, and that the trustees were the persons to have raised them, and that they took a fee, it is impossible to say they took more than a limited fee, a fee which must determine when the 600*l.* or 800*l.* should have been raised, and the ulterior right expectant upon the determination of that limited fee must at law have been in the heir of the settlor, not by way of limiting a fee upon a fee, but because it was part of the old right; and upon failure of the estates which were limited by the settlement it returned back to the settlor. The doctrine applicable to this part of the subject is to be found in *Co. Litt.* 191 *a. n.* 1. Considering, then, that no claim appears to have been made by the trustees, that nearly twenty years of a possession adverse to their claim had occurred at the time this ejectment was brought, and that much more than the full term of twenty years' adverse possession is since completed, (for the defendants' possession not being shewn to be under them, or on their behalf, must be taken to be adverse to their claim,) and that up to the present time they appear to have made no claim, can the defendant avail himself of this supposed right in the trustees? The presumption at this distance of time is, either that it

 was

1828.

Doe dem. Baune against Martin.

was released or satisfied; and we think it too doubtful and too distant to be a defence in the mouth of a stranger.

The next point I shall consider is, Whether the conveyance of the 6th and 7th of *May* 1824, passed any interest to the lessors of the plaintiff: and upon that I cannot bring my mind to doubt. The objection is, that the remainder-men (the grantors) had not entered at the time the deeds were executed, and that the defendant had. First, was an entry by the remainder-men necessary? It is conceded, that in ordinary cases it would not be. But it is said, that this is to be treated not as an ordinary case, because the defendant had entered. There is no authority to shew such a conveyance to be inoperative. In *Co. Litt.* 49 *a.* it is said, "If the feoffor be out of possession, a fine, recovery, indenture of bargain and sale enrolled, or other conveyance, does not avoid an estate by wrong." It does not say that the conveyance is void. But what estate had the defendant here? The remainder-men were entitled to treat him as having an estate by intrusion, for the sake of the remedy; but it does not lie in his mouth, as against them, to say he had any estate.

1828.

Doe dem. Brune against Martyn.

know it? Non constat that they did; and on the 7th of *May* the conveyance was made. Had the sale been of a *pretended* title only, the case would have been within the operation of the 32 *H.* 8. *c.* 9. But to bring a case within that statute, the seller must have a *pretended* right only, and the information must aver, that it is a pretended right only, for that is the point of the action, *Rex* v. *Barnes* (*a*). This was a sale not of a pretended but of a *valid* title, where the possession had gone with that title till within two months of the sale, and there had been no act of dispossession (if there ever was one) till within a much shorter period. It has been argued, that the conduct of the defendant amounted to what the law considers an intrusion, and that at the time of the conveyance of *May* 1824, the defendant was in the land as an intruder. But what does the law consider an intrusion? Not a mere wrongful entry into possession (unless the rightful owner chooses so to consider it), but a wrongful possession of the *freehold;* and what Lord *Ellenborough* lays down in *William* v. *Thomas* (*b*), as to disseisin, applies also to the case of intrusion, both equally ousting the right owner, not from the possession merely, but from the possession of the freehold. He there says, "Disseisin was formerly a notorious act, when the disseisor put himself in the place of the disseisee as tenant of the freehold, and performed the acts of the freeholder, and appeared in that character in the lords' court." But what act of notoriety is here stated to have been done by the defendant as claiming

(*a*) *Cro. Car.* 235. 1 *Hawk.* c. 86. s. 10. *Dy.* 74.
(*b*) 12 *East*, 155.

1828.

Doe dem. Brune against Martyn.

to put himself in the place of the rightful freeholder? At most, he was only in possession six weeks. It appears to me, that he had no such estate by wrong as to prevent the remainder-men from making a valid conveyance.

The last objection applies to two shares only, those of *Agnes Martyn* and *Grace Thomas*, and the foundation of the objection is this,—that before *Peggy Martyn's* death, and whilst their estates were contingent, they levied fines sur conusance de droit come ceo, and that all right as to their shares was thereby effectually extinguished and destroyed. These fines were not produced in evidence at the time of the trial, and do not constitute part of this special case; but as they are stated in the deeds of 6th and 7th *May* 1824, we are bound to assume there were such fines; and if such fines had the effect supposed, those deeds are upon the face of them bad as to these two shares. The fines are described in the release, as stated in this case, not as fines sur concessit (which if for years only would have worked no destruction or extinguishment), but the one as a fine sur conusance de droit, &c. and the other as a fine sur conusance de droit come ceo.

[redacted]

In *Whitfield* v. *Fawcett* (*a*), on a marriage settlement, a rent was created to the use and intent that the heirs of the body of the wife and their heirs should receive such rent, and subject thereto the land was limited to the husband and his heirs. There were two sons of the marriage, and they, in the life of the father and mother, sold this rent to the plaintiff without fine. The estate was the father's. Lord *Hardwicke* held that the sons had not an actual possibility at the time they sold; the rent might never arise, or if it did, the sons might not be heirs of the mother's body at her death. Nothing, therefore, passed by that conveyance in point of law, it being by deed, and not by fine, which had it been levied of this rent, and they had survived their mother, would have operated as against them by estoppel, binding them and their heirs. In *Wright* v. *Wright* (*b*), testator devised in fee to his two daughters, but that if either died unmarried, his son *Robert* should take the estate in fee, paying the other daughter 500*l.* Testator died. *Robert*, in consideration of natural love, conveyed the land and all his claim and right therein to his younger son *George* in fee. *Robert* died. One daughter died unmarried. *Robert*'s elder son filed a bill, claiming the estate on paying the other daughter 500*l.* The question was, Whether the conveyance to *George* was a bar to the claim of the elder son; and Lord *Hardwicke* held it was, for though the limitation to *Robert* was by way of executory devise, and therefore a possibility only, which the law will not permit to be granted, yet it may be disposed of in equity to a stranger, and the bill was dismissed with costs.

(*a*) 1 *Ves.* 391. (*b*) 1 *Ves.* 411.

1828.

Doe dem. Brune against Martyn.

But, although a contingent remainder cannot be conveyed at law, it may be extinguished; and the question is, Whether a fine in fee of necessity extinguishes it. It may be conceded that a fine, if so intended, will have that effect, and as far as this case is concerned, that such shall primâ facie be taken to be the intention; but the question is, Whether it shall so enure where a contrary intention is apparent. Mr. *Preston*, in his *Treatise on Conveyancing*, seems to think it shall. I do not cite this book as an authority, though from the learning, research, experience, and discrimination of the author, it is *extra-judicially* entitled to great weight; but I refer to it because it states the doctrine concisely, and the reason of it, and gives a reference to all the authorities. The passage to which I refer is to be found in p. 209.; and is as follows: "A person who has merely a right of action or of entry, or a *contingent* remainder, *or other future or executory interest*, which does not give a vested estate, should cautiously avoid levying this species of fine, (i. e. a fine sur conusance de droit come ceo,) unless he means to *extinguish* his interest; for as rights of action, &c. (of course including *contingent* remainders) cannot be transferred, the conusee in the fine

mainders, p. 289. he says, "That a contingent estate cannot be passed or transferred by a conveyance at law, before the contingency happens, otherwise than by way of estoppel by fine (or recovery), appears by *Weale* v. *Lower*, and *Vick* v. *Edwards*. In the seventh edition of that work by Mr. *Butler*, 366. this position is stated in a note. [A contingent remainder may before it vests, be passed by fine by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency,] but upon this head see Mr. *Preston's Treatise on Conveyancing*. The part within the brackets is in the text of *Fearne*, and it is introduced in the note as the legal position established by the section to which it applies. In the same edition, 366. it is said, that a contingent remainder cannot be passed or transferred by a conveyance at law before the contingency happens, otherwise than by way of estoppel by fine or by recovery where the contingent remainder-man comes in by voucher, appears by *Weale* v. *Lower* and *Vick* v. *Edwards*; but contingent estates it seems are assignable in equity. In the edition of *Gilbert on Uses*, by *Sugden*, p. 124. there is the following note by the editor: It should seem that it may still be considered clear that a fine in fee of a contingent estate will operate to pass it to the conusee by estoppel."

The opinions of text writers being so much at variance, it becomes necessary to examine the authorities on which they severally rely in support of those opinions. Mr. *Preston* relies on *Weale* v. *Lower*, and upon what he calls the sixth resolution in *Buckler's* case (*a*). But this should rather be called an extra-judicial dictum; for it was not one of the points re-

(*a*) 2 *Co.* 56 *a.*

1828.

Doe dem. Baker against Martin.

solved, nor did the facts of the case raise it. It is as follows: "Sixthly, it was said if disseisee levy a fine to a stranger, that in this case the disseisors shall retain the land for ever; for the disseisee against his own fine cannot claim the land, and the conusee cannot enter; for the right which the conusor had cannot be transferred to him; but by the fine the right is extinct, whereof the disseisor shall take advantage. In *Weale* v. *Lower* (*a*) the same doctrine is held by Lord *Hale*; but the case there in judgment did not fall within it. There a contingent remainder-man in tail, who had also the remainder in fee, levied a fine to the use of *J. S.* for 500 years, and died before the contingency happened: upon his death the remainder in fee descended upon his heir, and whether *J. S.* had right for the 500 years against such heir was the question. This depended upon the point whether the fine destroyed the contingent remainder; and it was held that it did not, because the fine was for years only; but *Hale* C. J. said, had the fine been levied in fee, it would have *destroyed the contingent use*, barred the heir, and enured and operated to the benefit of the possessor (*b*), as the fine of the disseisee to a stranger; but he had the case debated

[redacted]

them, and not a stranger, and therefore the disseisor shall not take benefit of it, and therefore they did conceive 2 *Co.* 56 *a.* to be no law." If a disseisin be unknown to disseisee, a fine by him shall not enure to the benefit of the disseisor. In *Fitzherbert* v. *Fitzherbert* (*a*) it was moved if disseisee, not knowing of the disseisin, had levied a fine to a stranger, whether that should have barred his right, and enured to the benefit of the disseisor, according to 2 *Co.* 56 *a.*, *Buckler*'s case, which if admitted would be of very mischievous consequence? But herein the Court delivered no opinion; but *Bramston* C. J. and myself (*Croke*) conceived it should not enure to the benefit of the disseisor, but to the use of the conusor himself; for otherwise a disseisin being secret may be the cause of disinherison of any one who intends to levy a fine for his own benefit, for assurance of his lands upon his wife and children, or otherwise." The doctrine whether a fine by disseisee shall enure to the benefit of the disseisor is adverted to and considered questionable in *Co. Litt.* 49 *a.* n. 4., *Goulds.* 162., 1 *Roll. Abr. Estoppel* (E), pl. 3., and *Williams* v. *Thomas* (*b*). In note 320. to *Co. Litt.* 49 *a.* n. 4., *Buckler*'s case is referred to, and it is said, " fine by disseisee extinguishes his right, and shall enure to the disseisor. But see this denied, *M.* 13 *Car. B. R. Crook*, n. 7., *Fitzherbert*'s case, *Hal. MSS.*". In *Gouldsborough*, 162., *Coke*, attorney-general, demanded this question of the Court, — if there be disseisor and disseisee, and during the disseisin the disseisee, when he has nothing but a right, levies a fine to a stranger, if by this fine the right of disseisee be gone, and if the disseisor

(*a*) *Cro. Car.* 484. (*b*) 12 *East*, 141.

shall

1828.

Doe dem. Brune against Martyn.

shall take advantage thereof? *Popham* and *Gawdy*. Nay, truly." In *Roll. Abr. Estoppel* (E), pl. 3., this is laid down,—"if disseisee suffers recovery to the use of *D.*, this shall be a good recovery by estoppel to bind disseisee and his heirs." If baron and feme be tenants in special tail, husband discontinues and dies, and the wife levy a fine without entering, the fine fortifies the discontinuance, and the wife cannot enter to be remitted, for the statute 32 *H.* 8. only avoids the discontinuance by the wife's entry, *Moore's* case (*a*). In *Wright* v. *Wright* (*b*), Lord *Hardwicke* lays it down that in law an heir may levy a fine in the life of his ancestor, which will bind by estoppel after descent to him. In the same case Lord *Hardwicke* says, "The reasons of the law's not allowing such a disposition which this Court (a court of equity) will, are mostly very refined," and Lord *Cowper* says in *Thomas* v. *Freeman* (*c*), such notions would not have prevailed now. In *Williams* v. *Thomas*, whether a fine by disseisee should enure to the use of the disseisor was raised as a question in argument; but the question was not decided, because the Court thought that there had been no disseisin; and Lord *Ellenborough* discusses the point what is a disseisin, and what he says as to disseisin is equally applicable to a case of intrusion or abatement. The true principle seems to be laid down in *The Earl of Peterborough* v. *Bludworth* (*d*). There in ejectment before *Bridgman* C. J. it appeared that disseisee levied a fine, and *declared the use by deed to* conusee. *Bridgman* held this should not enure to the use of the disseisor; but had no use been declared, it should have enured to the use of

(*a*) *Palmer*, 365. 2 *Roll.* 312.
(*b*) 1 *Ves.* 412.
(*c*) 2 *Vernon*, 565.
(*d*) 1 *Lev.* 123.

the

the disseisor, and should have extinguished the right of the disseisee, and this was intended to have been found specially; but the jury gave their verdict at large against the direction of the Court. *Bridgman*, therefore, was of opinion, that if no use had been declared, the fine would have enured to the use of the disseisor, and extinguish the right of the disseisee; but the use being declared, shewed the intent that it should not enure to the use of the disseisor. And this agrees with *Vick* v. *Edwards* and *Davies* v. *Bush*. In *Vick* v. *Edwards* (*a*) lands were devised to two trustees, and the survivor of them, and the heirs of such survivor, in trust to sell; and upon its being objected that the parties could not make a good title, because the fee-simple was not in the trustees, but was limited to the survivor, and it was uncertain who would be the survivor, Lord *Talbot* held that the trustees, joining in a fine, would pass a good title to purchaser by way of estoppel; that the fee was in abeyance, and it was certain that one of the two trustees must be the survivor, and entitled to this future interest, consequently his heirs would be estopped by reason of the fine levied by their ancestor, to say, "partes finis nihil habuerunt," although he that levied the fine had no interest. Lord *Talbot*, therefore, was of opinion that the trustees who had a contingent remainder might transfer that remainder, and make a good title by the operation of a fine.

In *Davies* v. *Bush* (*b*), *A.* was tenant for life under a settlement, remainder to his wife for life, remainder to their children, with ultimate remainder *to the survivor of*

(*a*) 3 *P. Wms.* 372. (*b*) 1 *M'Clelland & Younge*, 58.

them

1828.

Doe dem. Baune against Martyn.

them in fee: they mortgaged in fee to *L.* and *R.*, and levied a fine to the use of the mortgagee and his heirs during the lives of *A.* and wife and the survivor, remainder to the uses mentioned in the settlement, remainder to the mortgagee in fee. It was decided, that the contingent remainder in the survivor was not destroyed by the fine, because it was controlled and limited by the deed which led the uses, which shewed unequivocally that the parties only meant to give the mortgagee a security, and had no intention to affect any of the limitations in the original settlement; but that the fine, uncontrolled by the deed, would have destroyed them. These authorities shew, that a fine in fee will not extinguish a contingent remainder, when a contrary intention is apparent.

The contrary opinion proceeds on the doctrine of estoppel. *Co. Litt.* 352 *a.* shews, that every estoppel must be reciprocal that is to bind both parties, and that is the reason that, regularly, a stranger shall neither take advantage of, nor be bound by, the estoppel; but privies in blood, as the heir, and privies in estate, as the feoffee, lessee, &c.; privies in law, as the lord by escheat, tenant by the curtesy, tenant in dower, the

droit come ceo quil ad de son don, and though the king were a stranger to it, and had nothing but this seigniory out of the land, yet the king took advantage of this estoppel. The reason for this seems to be the prerogative of the king, whereof I shall not speak; but otherwise it is in the case of a common person, as 22 *Ed.* 3. 17. and 40 *Ed.* 3. 30. are agreed. See 41 *Ed.* 3. by *Finch*, that a stranger shall be concluded by a fine levied sur conusance de droit come ceo quil ad de son don." But this seems a mistake in *Co.*, for I find no case of the kind; and in 40 *Ed.* 3. 30., where it was argued that a fine should not bar, because the person against whom it was urged was a stranger to the person who levied the fine, *Finchden* says, "Certainly he may well counterplead against the fine, because he is not *privy to the fine.* At the end of the report is a note 'a stranger to a fine, or other matter of record, shall not be estopped.'" *Concordat An.* 38 *Ed.* 3. fo. 28. 12 *Ed.* 4. 13. per *Fairfax.* 11 *H.* 4. 1. 82. 42 *Ed.* 3. fo. 20. And in *Brook. Abr. Estoppel*, 216. it is said, a stranger to a fine shall not plead it for estoppel.

If the fines by *Agnes* and *Grace* destroyed their remainders (it being uncertain, when their fines were levied, whether they would ever be entitled to any thing in this estate), it must be upon technical reasoning and technical grounds only; and let us see, then, whether technical reasoning and technical grounds, as well as sound sense and correct legal principles, do not lead to a contrary conclusion. Upon the death of *Peggy Hoblyn*, the only possible claimants would be the heir-at-law of *Hooper Martyn* (*Thomas Elliott*) or *Agnes* and *Grace*, or the persons claiming under their fines. The heir-at-law

would

1828.

Doe dem. Brune against Martyn.

would be met by *Hooper Martyn's* will, because that gives away the whole estate to the surviving children of *Elliott* and *Parnell*. He must then rely upon the fines of *Agnes* and *Grace*, and then he is met by this dilemma: those fines either did operate, or they did not; they either passed the rights of *Agnes* and *Grace*, or they did not. If the fines operated and passed the rights, the rights are in the persons claiming under those fines; if they did not operate and pass the rights, the rights still remained in *Agnes* and *Grace*. To extricate himself from this dilemma, the heir must insist that *Agnes* and *Grace* are estopped from saying that their fines did not operate, and that nothing passed; but unless he is estopped, he cannot say they are estopped, because estoppels are reciprocal. And if he be estopped from saying that the fines did not pass the right to the conusees, the persons claiming under the fines of *Agnes* and *Grace* are entitled against him. But is it true that *Agnes* and *Grace* are estopped as against him? A fine bars by estoppel parties and privies, and parties and privies may avail themselves of such estoppel; but can a stranger insist upon it? and the heir-at-law is a stranger to this fine. As against the parties claiming under their fines,

1828.

Doe dem. Brune against Martyn.

them: their fines had not passed it from them. Had their claim been resisted by the persons claiming under the fines, they might have been estopped *as against them*; but their claim would have been defeated, not because the right was not in them, but because they were estopped by their own fines, as against the parties and privies to those fines, from saying they had not passed away the right. Upon a resistance to their claim by a person not entitled to insist upon the estoppel, it seems to me their claim must have prevailed. The true state of the law upon this point I take to be this, — that a fine by a contingent remainder-man passes nothing, but leaves the right as it found it; that it is, therefore, no bar when the contingency happens, in the mouth of a stranger to that fine, against a claim in the name of such remainder-man; that it operates by estoppel, and by estoppel only, and that parties or privies may avail themselves of that estoppel, but parties or privies only. That being the case, the lessors of the plaintiffs are entitled to recover the two-ninths which belonged to *Agnes* and *Grace*, as well as the remaining seven-ninths of the estate.

Postea to the plaintiff.

1828.

GIBBS *v.* SAMUEL STEAD and W. REED.

The statute 58 *G.* 3. *c.* 5. s. 9. enacts, that the collectors of the land-tax shall levy and collect the rates assessed, according to the intent of that act; and they are required to demand all sums of money taxed and assessed of the parties themselves, as the same shall become due, if they can be found, or else at the place of their last abode, or upon the premises charged with the assessment. Sect. 17. enacts, that if any person shall

TRESPASS for breaking and entering the plaintiff's house, and seizing his goods. Plea, not guilty. At the trial before *Doyley* Serjt. at the Spring assizes for the county of *Surrey* 1828, it appeared that the defendant *Stead* was collector of the assessed and land-taxes for the south division of the parish of *St. George, Southwark:* the other defendant, *Reed*, was a broker. On the 22d of *March* 1827, the two defendants went to the plaintiff's house when he was absent from home, and demanded the payment of 2*l.* 11*s.* for two quarters' taxes, viz. 1*l.* 17*s.* for assessed taxes, and 14*s.* for land-tax. They were informed by the servant of the plaintiff that he was not at home; but they entered the house, made an inventory of his goods, and left a man in possession. There was not sufficient proof of service of notice of action on the defendant *Stead*. The defendants put in a warrant of the commissioners of taxes for the borough of *Southwark*, autho-

1828.

GIBBS against STEAD.

rizing the defendant *Stead*, as collector of the land-tax, to levy the land-tax by four equal quarterly payments; (that is to say,) the first quarterly payment on or before the 24th day of *June* next ensuing; the second quarterly payment on or before the 29th day of *September* next ensuing; the third quarterly payment on or before the 25th day of *December* next ensuing; and the fourth quarterly payment on or before the 25th day of *March*, which would be in the year 1827."

It was contended on the part of the plaintiff, that the land-tax for the quarter ending on the 25th of *March* was not due until that day, and that the defendants having distrained for that quarter's land-tax, the distress was unlawful; and, secondly, that they had no right to distrain, either for the assessed (*a*) or the land-tax (*b*), until there had been a neglect or refusal of payment by the plaintiff: and that there was no evidence of such a refusal in this case, as the plaintiff was absent from home when the demand was made, and the defendants had not allowed a reasonable time to elapse between the demand and the making of the distress, so as to enable him to make the payment required. The learned Serjeant doubted whether the land-tax distrained,

(*a*) By sect. 33. of the 43 *G.* 3. *c.* 99. it is enacted, "that if any person or persons shall *refuse* to pay the several sum and sums charged upon him, her, or them by any act or acts granting the duties herein mentioned, or any other duties to be assessed under the regulations of this act, upon demand made by the collector or collectors of the division or place, according to the precepts or estreats to him or them delivered by such commissioners, it shall be lawful for such collectors, who are hereby respectively thereunto authorized and required, for non-payment thereof, to distrain upon the messuages, lands," &c.

(*b*) By sect. 2. of the 38 *G.* 3. *c.* 5. it is enacted, "that the sum of 1,989,673*l.* 7*s.* 10¼*d.* shall be raised, levied, and paid to his majesty within the space of one year from the 25th day of *March* 1798, and shall be assessed

1828.

Gross against Susan.

trained for was due; but he was clearly of opinion that the distress was unlawful, upon the ground that the defendants had not, after they had made the demand of the taxes upon the premises, allowed a reasonable time

---

assessed in the several counties, &c. of *England*, *Wales*, and *Berwick-upon-Tweed*, according to the proportions therein mentioned."

Sect. 9. enacts, that the persons appointed by this act to be collectors "shall levy and collect all and every the rates and taxes so assessed and charged, according to the intent and direction of this act; which said collectors are hereby required to demand all and every the sum and sums of money which shall be so taxed and assessed of the parties themselves as the same shall become due, if they can be found, or else at the place of their last abode, or upon the premises charged with the assessment; and the said several collectors shall collect and levy the said monies so charged for his majesty's use, and are hereby required and enjoined to pay unto the receivers-general, or their deputies, all and every the said rates and assessments by them respectively collected and received, at such time or times, place or places, as the said commissioners, or any two or more of them, shall appoint; so as the whole sums due for each quarterly payment shall be paid or answered by the said collectors to the receivers-general, or their deputies respectively, upon the days and at the times by this act appointed for payment thereof."

Sect. 12. enacts, that the sum of 497,418*l.* 6*s.* 11*d.* and nine-sixteenth parts of a penny, for the first quarterly payment of the said assessments, shall be levied and paid unto the receivers-general of the said several counties, &c. on or before the 24th day of *June* 1798; the like sum for the second quarterly payment, on or before the 29th *September* 1798; the like sum for the third quarterly payment on or before the 25th day of *December* 1798; and the like sum for the last of the said quarterly payments on

for the plaintiff to pay the same: there was no refusal or neglect, therefore, by the plaintiff to pay before the distress was made; and the jury, under his direction, found a verdict for the plaintiff, but liberty was reserved to the defendants to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

Broderick shewed cause. At the time when the defendants distrained, the last quarter's land-tax was not due. By the warrant of the commissioners, which is founded on the stat. 38 *G.* 3. *c.* 5., the defendants were authorized to levy the land-tax by four equal quarterly payments: the times of payment were those specified in the twelfth section of that statute. The land-tax for the last quarter did not, according to that section, become due until the 25th of *March*, so that on the 22d of that month they levied for more than they had a right to do, and the distress was, therefore, unlawful. But, secondly, assuming that the whole sum claimed by the defendants was due, the distress was unlawful, because they had no authority to distrain for the land-tax under the stat. 38 *G.* 3. *c.* 5., or for the assessed taxes under the 43 *G.* 3. *c.* 99., until there had been a refusal or neglect to pay by the plaintiff. The defendants went to the plaintiff's house when he was absent, demanded payment of the taxes, and distrained, without giving him any opportunity of complying with the demand. There was not, therefore, any neglect or refusal to pay within the meaning of the acts of parliament.

Hutchinson contrà. The whole sum for which the defendants distrained was due on the 22d of *March*.

1828.

Grant against Stead.

The 38 *G.* 3. *c.* 5. *s.* 2. enacts, that the entire sum therein mentioned shall be raised, levied, and paid within the space of one year from the 25th day of *March* 1798. By section 9. the collectors are required to levy and collect all and every the taxes assessed and charged, and to demand the sums which shall be so taxed and assessed of the parties themselves, if they can be found, or else at the place of their last abode, or upon the premises charged with the assessment; and the collectors are to pay the rates and assessments received by them to the receivers-general, or their deputies, at such times as the commissioners shall appoint, so as the whole sums due for each quarterly payment shall be paid *by the collectors to the receivers-general*, or their deputies respectively, upon the days and at the times by that act appointed for payment thereof. By section 12. the last of the four quarterly payments is required to be made *by the collectors* to the receiver-general *on or before the 25th of March* 1799. The collectors must, by necessary implication, have had authority to collect those rates for that quarter before the 25th of *March*, because the fourth instalment was payable on or before that day to the receiver. Then as to the other point, it is insisted,

last place of abode, or on the premises charged. It is the duty of a person liable to pay taxes, as soon as they become due, to leave a sufficient sum on the premises to pay them whenever they are demanded.

BAYLEY J. I think that the direction of the learned serjeant upon the point decided by him was right, and that the rule for entering a nonsuit ought to be discharged. I have no doubt that the land-tax assessment for the last quarter ought to be considered as having become due at any period in the current quarter which ended on the 25th of *March*. The collector must necessarily have the power of completing the collection of all the sums due in that quarter before the 25th of *March*; for he is bound to pay to the receivers-general the whole sum payable for that quarter on or before that day. The land-tax for the quarter ending on the 25th of *March* was, therefore, due on the 22d, when the distress in question was made, and there is no objection to the distress on the ground that the sums distrained for were not due. But I am of opinion that the distress in this case was unlawful, because the demand not having been made on the party himself from whom the taxes were due, there ought to have been an interval between the demand and the seizure, so as to allow the plaintiff an opportunity of paying the sum demanded. The statute 38 *G.* 3. *c.* 5. *s.* 9. requires the collectors to demand all sums taxed and assessed of the parties themselves, as they shall become due, if they can be found, or else at the place of their last abode, or upon the premises charged with the assessment. If the demand be made on the premises charged with the assessment,

1828.

Gibbs against Stead.

there ought to be between the demand and seizure a reasonable interval of time, sufficient to allow the party an opportunity of paying the sum required. Here the collector went to the plaintiff's house in his absence, demanded the taxes; and they not having been paid upon such demand, immediately distrained. Now the seventeenth section, in case of any neglect or refusal to pay taxes upon *demand* made by the collectors, authorizes them to distrain. The demand mentioned in that section must be such a demand as is mentioned in the ninth section. It must, therefore, be a demand, either on the party himself, or at the last place of his abode, or upon the premises charged; and if the demand be made on the premises charged, there ought to be between the demand and the seizure an interval of time sufficient to admit of the party making the payment required. To hold that a distress might be put in immediately after a demand made on the premises, in the absence of the owner, would be a very harsh construction of the act, and might be attended with great inconvenience in many cases; for poor persons, who are under the necessity of leaving their houses in the day-time to work, might in their absence

money demanded had not been paid, the neglect to pay after such a demand might have been evidence of a refusal within the meaning of the act of parliament. If the party liable had been at home at the time when the taxes were demanded, and knew that the demand had been made, the neglect to pay would have been evidence of a refusal; or if the collector had called once, and given notice that he would come again on the following day, and the money was not then left, that would have been evidence of a refusal. But where the demand is made, not on the individual, but on the premises, at a time when the occupier is absent from home, and a reasonable time is not allowed to elapse after the demand made, so as to enable him to comply with the demand, the non-payment of the taxes in that case is not evidence of a refusal; and if there was no refusal or neglect to pay, the distress was unlawful. The rule for entering a nonsuit must, therefore, be discharged.

HOLROYD J. Before the defendant could have any right to distrain, there ought to have been a default of payment upon or after demand made. The statute 38 *G.* 3. *c.* 5. *s.* 9. requires the collectors to demand the sum assessed of the parties *themselves*, as the same shall become due, if they can be found, or else at the place of their last abode, or upon the premises charged with the assessment. Here the demand was not made on the party himself, but on the premises charged with the assessment. Until some default was made by the plaintiff there was no ground for making a distress. Until the plaintiff had had an opportunity of complying with the demand made by the collectors, there could

1828.

GIBBS against STEAD.

not have been any default. The plaintiff was absent from home when the demand was made; he had no opportunity given him of complying with that demand before the distress was made, and had not been guilty of any default. The distress was, therefore, unlawful, and the plaintiff is entitled to recover.

LITTLEDALE J. I am of the same opinion. I think that at the time when the distress was made the land-tax was due for the two quarters, and that the collector before the end of the current quarter was authorized to demand payment, and, upon refusal, to distrain: but in order to justify the collector in making a distress, there ought to have been some previous default in the plaintiff. There was no default in this case. The demand was made on the premises charged with the assessment at a time when the occupier was absent. He ought to have had an opportunity of complying with the demand, and a reasonable interval of time ought to have been allowed him for that purpose. If after such an interval had elapsed he had not paid, he would have been guilty of a default. Or if in this case he had been at home, and promised to pay the sum demanded at a certain time, and had failed in so doing, he would have been guilty of a default. But he was not at home when the demand was made, and not having had any previous notice that the collector would call for the taxes, he was not bound to have left on the premises money sufficient to pay them. I think that some interval of time, varying according to the circumstances of the case, ought to be allowed, after the demand made, to make the payment required, before a distress can law-

fully

fully be made. The defendants in this case distrained immediately after they had demanded the taxes. The distress was, therefore, unlawful, and this rule must be discharged.

Rule discharged.

CHARLES BROOKE *against* THOMAS NOAKES.

In an action founded on the statute 11 *G.* 2. *c.* 19. *s.* 3. against a party for aiding and assisting the tenant in the fraudulent removal of his goods, with intent to prevent the landlord from distraining them, it is incumbent on the landlord not only to prove that the defendant assisted the tenant in such fraudulent removal, but also that he was privy to the fraudulent intent of the tenant.

Semble, That the statute is so far penal, that it is incumbent, in an action by the landlord against a third party, for assisting the tenant in such fraudulent removal, to bring the case by strict proof within the words of the first section.

DECLARATION in debt on the statute 11 *G.* 2. *c.* 19. stated, that on the 29th *September* 1822, the plaintiff demised to one *G. Meers* a messuage or tenement, with the appurtenances, and also certain closes of land in the county of *Kent*, habendum from year to year at a yearly rent; that 735*l.* 2*s.* 9*d.* of the rent was in arrear; that certain cattle, goods, and chattels of *Meers* being upon the premises, and liable to be distrained for the said arrears of rent, *Meers* fraudulently removed and carried away the cattle, &c. from off the demised premises, with intent to prevent the plaintiff from distraining the same for the rent aforesaid; and that the defendant unlawfully and knowingly aided and assisted *Meers* in the said *fraudulent* carrying away and removing of the said cattle, &c., and in keeping and continuing the said cattle, &c. so conveyed away and removed away as aforesaid, *with intent to prevent the same from being distrained* for the said rent so being due, payable, and in arrear, contrary to the statute. Averment, that the cattle were of the value of 1000*l.*, whereby and by force of the statute an action had accrued to the plaintiff to demand from the defendant 2000*l.*, being

double

1828.

Bacon against Noakes.

double the value of the said cattle, &c. Plea, nil debet. At the trial before *Burrough* J., at the spring assizes for the county of *Kent* 1828, it was proved that *Meers* was tenant to the plaintiff of the premises mentioned in the declaration, and that the rent was in arrear; that in *August* 1826, the rent charged in the declaration was due to the plaintiff from *Meers*, that he then had upon the farm five cows (which were usually milked by his wife), and upwards of 200 sheep. On *Saturday*, the 2d of *September*, the plaintiff called on *Meers*, and pressed him for payment of the rent. *Meers* on that occasion said that the defendant would take his stock at a fair valuation. The defendant's farm was at a distance of two miles from that of *Meers*. On *Sunday*, the 3d of *September*, the cows, sheep, and goods of *Meers* were removed from his farm. The cows were driven by one *Rickwood*, who married the defendant's sister, and lived upon his farm with him. The marks on *Meers*'s sheep were *G. M.*; but after they were removed to the defendant's premises, they were marked *T. N.* On the 8th of *September* the wife of *Meers* was seen milking his cows upon the defendant's premises. The learned Judge told the jury, that there was

having found a verdict for the defendant, a rule nisi was obtained for a new trial, upon the ground that the verdict was against evidence. *Lister* v. *Brown* (*a*) and *Stanley* v. *Wharton* (*b*) were cited.

Thesiger now shewed cause. The statute 11 *G.* 2. *c.* 19. *s.* 1. enacts, "that if any tenant, &c. shall fraudulently or clandestinely convey away or carry off the premises his goods, to prevent the landlord from distraining the same for arrears of rent, it shall be lawful for the landlord, within thirty days after such conveying away or carrying off such goods, to distrain;" and section 3. enacts, "that if any tenant shall fraudulently remove or convey away his goods, or if any person shall wilfully and knowingly assist such tenant in such fraudulent conveying away or carrying off of any part of his goods, or in concealing the same, he, the person so offending, shall forfeit and pay to the landlord double the value of the goods by him carried off or concealed." Section 3. not only creates a duty where none existed before, but also makes the breach of that duty an offence, and subjects the third party to a penalty, viz., the payment of double the value of the goods removed. This statute is remedial, so far as it extends the remedy of the landlord against the tenant, but it is highly penal as it affects third parties. A party who seeks to recover the penalty must shew by strict proof that the defendant has committed an offence within the meaning of that section. The offence imputed to the defendant is, that he wilfully and knowingly assisted *Meers* in the fraudulent carrying away of his goods. To bring the case within the third section, the plaintiff ought to have proved, not merely

(*a*) 3 *D.* & *R.* 501. (*b*) 9 *Price*, 301.

that

1838.

Brooke against Noakes.

that there was a fraudulent removal by the tenant himself, but that the defendant, the person assisting in the removal, was privy to that fraudulent intent with which the removal was made. *Bach* v. *Meats* (*a*) shews that the third section is confined in its operation to cases falling within the first. There was not in this case any satisfactory evidence to shew that the defendant was privy to the fraudulent intent of *Meers* when he removed the goods to the defendant's premises, and therefore the verdict was right. In *Lister* v. *Brown* (*b*) the action was against the tenant for removing the goods, and against his son for assisting in such removal. The goods were, in fact, removed by the son. It was objected, that it was not a case within the statute, because the removal was not the act of the tenant, but of a third party. The jury having found that the removal by the son was with the privity of the father, the Court, on motion for a new trial, thought that the act of removal by the son under those circumstances must be considered the act of the father; and, consequently, that the removal was made by the tenant, and that the other defendants assisted him in such removal. *Stanley* v. *Wharton* (*c*) shews that circumstances of suspicion

[redacted]

Stanley v. *Wharton*. So the statute 29 *Eliz. c.* 4. which subjects a sheriff, who takes larger fees than allowed by that statute, to an action for treble damages, at the suit of the party aggrieved, has been held to be a remedial, and not a penal statute, *Woodgate* v. *Knatchbull* (*a*). That being so, there was ample evidence in this case to shew that the defendant aided and assisted *Meers* in the fraudulent removal or concealment of his goods, and that he did so with intent to prevent the plaintiff from distraining them. The cattle were removed to the defendant's lands, and were driven there by his brother-in-law. The cows while on his lands were milked by the wife of the tenant. That was proof of continued ownership by *Meers*; and the cattle having remained upon the defendant's land, he must have known from *Meers* for what purpose they were removed. At all events there was sufficient evidence of such a concealment as the sheep were capable of; they were mixed with the defendant's sheep, and their marks were changed. It ought to have been left to the jury upon these facts, Whether the defendant was privy to the fraudulent removal by the defendant, and concurred in it?

BAYLEY J. I think that the verdict in this case was right. The statute 11 *G.* 2. *c.* 9. *s.* 3. is remedial as well as penal. It is remedial so far as it enlarges the remedy which the landlord had against his tenant; but it is so far penal that the landlord who seeks to visit a third party with the penal consequences of the act, must bring the case, by strict proof, within the words of the enacting

(*a*) 2 *T. R.* 148.

clause.

1828.

BROOKE against NOAKES.

clause. It ought to have been proved, therefore, not only that the defendant assisted in the removal or concealment of the goods, but that he gave assistance with the intent to prevent the landlord from distraining. Now here there was no evidence which ought to have satisfied the jury that the defendant assisted in the removal of the cattle. If the fact were so, it might have been proved by *Rickwood*; but the plaintiff did not call him. But, independently of that, I think that the defendant ought not to be visited with the penal consequences of this act of parliament, unless it be distinctly shewn that he was privy to the fraudulent intent with which the tenant's cattle were removed. Assuming, therefore, that the defendant assisted in the removal or concealment of the property, there was no evidence that he did it with the fraudulent intent to prevent the landlord from distraining. Upon this evidence the verdict was properly found for the defendant. The rule for a new trial must, therefore, be discharged.

HOLROYD and LITTLEDALE Js. concurred.

Rule discharged.

[redacted]

1828.

CHATFIELD *against* PARKER and COTTERELL.

Trespass for mesne profits. Plea, a judgment recovered by defendant in 1822 against *A.*; an elegit sued out thereon; an inquisition held, whereby it was found that *A.*, at the time when the judgment was recovered, was seised for life of (inter alia) the premises mentioned in the declaration, and that the sheriff delivered those premises to the defendant. Replication, that in 1820, *A.*, by indenture, bargained and sold, inter alia, the premises mentioned in the declaration to the plaintiff: that he entered and continued in possession until the committing of the trespasses. The defendant craved oyer of the indenture; and it thereby appeared, that for the purpose of securing an annuity to *B.*, *A.* in 1819 had conveyed the premises in the declaration mentioned to *B.* for 100 years, and that subject thereto he conveyed them to the plaintiff for better securing a second annuity granted by the deed. Upon demurrer, the replication was held to be good, inasmuch as it shewed that the plaintiff was in possession at the time when the trespass was committed; that *A.* had no interest in the premises at the time when the judgment was obtained against him; that the defendant, consequently, could derive no title from him, and was a wrongdoer.

TRESPASS for breaking and entering the manors of *Budbrooke* and *Keckthorne*, and ten messuages, &c. in the county of *Warwick*, and ejecting and expelling the plaintiff from his possession and occupation thereof, and keeping possession and taking the issues and profits. Plea, as to entering the tenements in the declaration mentioned, and ejecting, expelling, and amoving the plaintiff from his possession of a moiety of the said tenements; that *Parker*, in *Hilary* term 1822, recovered a judgment in the King's Bench against the Right Honourable *John Evelyn Pierrepoint Dormer*, Lord *Dormer*, for 400*l.*; and that the defendant *Parker*, for obtaining execution of the same judgment, sued out of the King's Bench an elegit upon the judgment, directed to the sheriff of *Warwickshire*; that by an inquisition held on, &c., at, &c., it was found that Lord *Dormer* was seised in his demesne for his life of (inter alia) the premises in the declaration mentioned, which, together with other land in the inquisition mentioned, were a moiety of the lands of the said *John E. P.* Lord *Dormer*, in the sheriff's bailiwick, which said moiety the sheriff caused to be delivered to the defendant *Parker*, to hold as his free tenements. The

plea

1828.

CHATFIELD against PARKER.

plea then stated, that in due execution of the writ sued out by *Parker*, the other defendant, *Cotterell*, in aid and assistance of the sheriff, and as his bailiff, and by his command, on the said 18th of *June* 1828, entered the tenements in the declaration mentioned, and ejected and expelled the plaintiff, and put *Parker* into, and *Parker* accordingly took possession of a moiety thereof, the same being part of the tenements in the inquisition mentioned, and kept and continued the plaintiff so expelled, &c. as was lawful for the cause aforesaid. Replication, that the *said* Lord *Dormer* being seised in his demesne for his life of and in the tenements, with the appurtenances in the declaration mentioned, before the day of giving judgment in the plea mentioned, to wit, on the 14th of *March* 1820, by an indenture then made between the *said* Lord *Dormer* of the first part, *W. S.* and *J. C.* of the second part, and the plaintiff of the third part, granted, bargained, sold, and demised to the plaintiff, his executors, &c. amongst other things the premises mentioned in the declaration; habendum to the plaintiff, his executors, &c. for the term of 200 years from the day next before the date of the indenture; that the plaintiff entered and became possessed for the said term, and con-

1828.

CHATFIELD against PARKER.

acting on the part of the same society, of the second part; and *Charles Chatfield* (the plaintiff), of *Angel-court*, of the third part. It then recited, that by an indenture of the 18th *June* 1819, made between the said *Evelyn Pierrepoint*, Lord *Dormer*, of the first part; *W. S.* and *J. C.* of the second part; and *T. Dawes* of the third part, in consideration of 14,998*l.* paid to the said *E. P.* Lord *Dormer* out of the funds, and on behalf of the society or partnership in manner therein mentioned, he the said *E. P.* Lord *Dormer* did grant, &c. unto the said *W. S.* and *J. C.*, their executors, &c. an annuity of 1725*l.* to be paid and payable for ninety-nine years, to be computed from the day next before the date of the indenture, and thenceforth if the said *E. P.* Lord *Dormer* should so long live, to be charged and chargeable upon, and payable out of (inter alia) the premises mentioned in the declaration, habendum for ninety-nine years, and thenceforth if the said *E. P.* Lord *Dormer* should so long live, and that the said *E. P.* Lord *Dormer* did grant, bargain, sell, and demise unto the said *T. Dawes*, his executors, &c. (inter alia) the premises mentioned in the declaration, habendum to *Dawes*, his executors, &c. for 100 years, to be computed from the day next before the date of the said indenture, if the said *E. P.* Lord *Dormer* should so long live, in trust to pay the said annuity out of the rents and profits, &c. It then recited, that the said *E. P.* Lord *Dormer* had contracted and agreed with the said *W. S.* and *J. C.* for the absolute sale to the said *W. S.* and *J. C.*, as two of the directors of the said *Pelican* Life Insurance Company, on behalf of the company, of an annuity of 800*l.* to be paid to them *W. S.* and *J. C.*, their executors, &c. for ninety-nine years, to be

1828.

CHATTFIELD against PARKER.

computed from the day next before the date of the indenture of the 14th *March* 1820, if the said *E. P.* Lord *Dormer* should so long live, at and for 6998*l.*, and that in pursuance of the said agreement, they *W. S.* and *J. C.* had paid that sum to the said *E. P.* Lord *Dormer*; and that upon the treaty for the purchase of the said annuity of 800*l.*, it was agreed that the annuity of 1725*l.*, and all powers, remedies, and trusts for securing the same, should be ratified and confirmed, and subject thereto, that the said annuity of 800*l.* should be charged upon (inter alia) the premises mentioned in the declaration. The indenture then witnessed, that in pursuance of that agreement, he the said *E. P.* Lord *Dormer* had ratified and confirmed the annuity of 1725*l.* granted by the indenture of the 18th *June* 1819, and that in pursuance and further performance of the said agreement, and in consideration of the sum of 6998*l.* paid to him by *W. S.* and *J. C.* as thereinbefore mentioned, he the said *E. P.* Lord *Dormer* had granted, bargained, sold, and confirmed to *W. S.* and *J. C.* their heirs, executors, &c. an annuity of 800*l.* to be paid and payable for ninety-nine years, if the said *E. P.* Lord *Dormer* should so long live, to be charged and chargeable upon the lands

habendum the premises thereinbefore granted, and every part and parcel of the same, but subject and charged as thereinbefore was mentioned to *Chatfield*, his executors, &c. for the term of 200 years, to be computed from the day next before the date of the indenture, and thenceforth next ensuing, and fully to be complete and ended without impeachment of waste, if the said *E. P.* Lord *Dormer* should so long live. The defendant then demurred specially to the replication.

Serjt. *E. Lawes* in support of the demurrer. The replication is bad. It ought to have shewn the commencement of Lord *Dormer*'s life estate, *Co. Litt.* 303 b. [*Holroyd* J. That is unnecessary, because both the plaintiff and defendant claim under Lord *Dormer*.] They do not claim under the same instrument. The plaintiff claims under the lease, the defendant under the judgment and elegit. Secondly, the replication is no answer to the plea. The plea shews a judgment recovered against *John E. P.* Lord *Dormer*. The replication shews a demise by indenture by *E. P.* Lord *Dormer*. It does not shew that the Lord *Dormer* mentioned in the plea is the same as that in the lease. It states that the lease was made by the *said* Lord *Dormer*, viz. the Lord *Dormer* mentioned in the plea. That was *John E. P.* Lord *Dormer*. The lease upon oyer appears to have been made by *E. P.* Lord *Dormer*. That lease will not bar the defendant, who claims under *John E. P.* Lord *Dormer*. If an action had been brought on the lease against *John E. P.* Lord *Dormer*, he might have pleaded non est factum, *Field* v. *Winlow* (*a*). Assum-

(*a*) *Cro. Eliz.* 897.

1828.

CHATFIELD against PARKER.

ing the grantor of the lease to be the same person as the defendant in the action in which the judgment was obtained, it is not alleged that he was known as well by one name as the other; and, according to *Cole* v. *Hindson* (*a*), *Shadgett* v. *Clipson* (*b*), and *Evans* v. *King* (*c*), such an averment was necessary in order to obviate this objection. In the next place, the plaintiff, in order to maintain this action, was bound to shew a lease giving him the right of possession. But the lease set out upon oyer gives him a right in reversion only. The action being not against a mere wrongdoer, but against a judgment and elegit creditor, the plaintiff was bound to shew title. The lease being a lease in reversion, gives him no title to the possession of the premises mentioned in the declaration. The replication confesses all the facts in the plea, and is intended to avoid them, and to shew a right to the possession in the plaintiff, but does not do so.

Platt, contrà, was stopped by the Court.

BAYLEY J. This is an action of trespass. Actual possession is sufficient to entitle a man to maintain tres-

1828.

CHATFIELD against PARKER.

In order to give the defendant a good title against the plaintiff, (who is admitted by the demurrer to have been in possession,) the defendant ought to shew that Lord *Dormer* had some title to the land in question, at the time when the elegit issued. By the inquisition set out in the first plea, it is found that Lord *Dormer* was seised for life. Assuming that to be a sufficient allegation that he was so seised, does the replication confess and avoid the matters stated in the plea? It states that Lord *Dormer* being seised for life before the judgment (mentioned in the plea), in *March* 1820 by indenture bargained and sold to the plaintiff the tenements, (including the premises mentioned in the declaration,) and that he entered and became possessed, and continued so possessed until the committing of the trespass. The plaintiff and defendant claim under Lord *Dormer*. The plaintiff claims by virtue of a deed executed in 1820; the defendant by virtue of a judgment obtained, and elegit issued, in 1823. The title of the plaintiff is prior in point of time. The lease supersedes Lord *Dormer*'s right. It has been insisted that the lease set out in the replication is not an answer to the plea, because it appears by the plea that the judgment was obtained against Lord *Dormer*, sued by one christian name, and it appears by the lease set out on oyer, that Lord *Dormer*, who granted that lease, does not use the same christian name. But the replication alleges that the *said* Lord *Dormer* being seised for life by indenture, demised the premises. The replication, therefore, shews that Lord *Dormer*, who granted the lease, and Lord *Dormer*, against whom the judgment was obtained, was the same person. It is not competent to the defendant upon demurrer, to say that it was not the same Lord *Dormer*. Lord *Dormer*

1828.

CHATFIELD against PARKER.

may have been sued by a wrong Christian name in the suit in which judgment was obtained against him, or he may have used a wrong Christian name in the lease. The lease is not void by reason of the lessor having used a wrong Christian name. But it is said that the lease set out on oyer shews that the plaintiff had no right to the premises in question. It recites an indenture made by Lord *Dormer* in *June* 1819, whereby he granted an annuity of 1725*l.* for ninety-nine years charged upon (inter alia) the premises mentioned in the declaration, and he granted, bargained, and demised those premises unto *H. Dawes.*, habendum for 100 years. It then recites, that he had agreed to sell another annuity of 800*l.* for ninety-nine years, and he confirms the annuity of 1725*l.*, and subject thereto charges the premises in the declaration with the annuity of 800*l.*; and for better securing the regular payment of that annuity, bargains, sells, and demises unto the plaintiff (among others) the premises mentioned in the declaration, for 200 years. It appears, therefore, by the lease set out on oyer, that those premises were charged with an annuity of 1725*l.*, and for better securing the payment of that annuity had been

1828.

CHATFIELD *against* PARKER.

Dawes had not entered at that time. It is quite sufficient, however, for the purposes of this case, to say that the lease set out upon the record destroys all right of the defendant, who claims under a judgment obtained against Lord *Dormer* in 1823, because it shews that Lord *Dormer* at that time had no interest in the premises mentioned in the declaration. The defendant, therefore, could derive no title from him, and was consequently a wrongdoer; and the plaintiff having shewn that he was in actual possession at the time when the trespass was committed, is entitled to maintain this action. The judgment of the Court must be for the plaintiff.

HOLROYD J. concurred.

Judgment for the plaintiff (*a*).

(*a*) This action was originally commenced in the name of *John Doe*. The defendant pleaded the judgment and elegit, &c. The plaintiff replied, the demise by indenture to *Chatfield*, his entry, and that after such entry *the said plaintiff*, in *Hilary* term 1826, commenced an ejectment against the defendants, in which action the said *John Doe*, as the nominal plaintiff, complained, &c. (setting out the declaration). It then stated that *John Doe*, in *Michaelmas* term in that year, recovered judgment, and afterwards entered. Upon demurrer to this replication, the Court, after argument at the sittings in banc. after *Hilary* term 1827, held the replication to be bad; first, for stating that *Chatfield* was in possession at the time of the trespasses, thereby negativing *John Doe*'s possession of them at that time, which was a departure from the declaration; and, secondly, because the replication did not, and, as it seemed, could not, shew any right to the possession in *John Doe*, or even state that he was a nominal plaintiff in this action, as well as the ejectment, but only that *John Doe*, as the nominal plaintiff in the ejectment complained, &c.; and they intimated that the plaintiff had better amend, by making *Chatfield* the plaintiff on the record instead of *John Doe*, and the amendment was made accordingly.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Ninth Year of the Reign of GEORGE IV.

MEMORANDA.

In the early part of this term, Mr. Justice *Holroyd*

1828.

HELPS *against* GLENISTER.

Friday, November 7th.

The statute 58 *G.* 3. *c.* 75. prohibits the buying of pheasants in all cases, and therefore by a contract for the sale of live pheasants, no property passes to the purchaser.

TROVER for live pheasants. Plea, general issue.

At the trial before *Holroyd* J., at the Summer assizes for the county of *Bucks* 1828, the following appeared to be the facts of the case: The plaintiff was a dealer in pheasants residing at *Bayswater*. The defendant was a breeder of pheasants residing in *Buckinghamshire*. In *October* 1827, the plaintiff went to the defendant to purchase some live pheasants, which were kept in pens. He agreed to purchase twenty-seven old birds at the rate of 5*l.* 10*s.* per score, and paid for the same; and the defendant agreed to keep them at 2*d.* per head per week, until the plaintiff should take them away. The plaintiff afterwards agreed to buy 100 young birds at 4*l.* per score, and paid 2*s.* 6*d.* as a deposit, and the defendant agreed to keep them at the same rate, until such time as the plaintiff could conveniently take them away. Three-fourths of the young birds were hens, which bear a higher price than cocks, being more valuable for breeding, and the price was calculated accordingly. The plaintiff afterwards took away the twenty-seven old pheasants and thirteen young ones, and subsequently demanded the remaining eighty-seven, and tendered the plaintiff the price agreed upon. The defendant refused to deliver them. The learned Judge was of opinion that the buying of these pheasants was prohibited by the statute 58 *G.* 3. *c.* 75., and that no property, therefore, passed to the plaintiff by the

contract

1828.

HELPS *against* GLENISTER.

contract of sale. The plaintiff was, therefore, nonsuited.

B. Monro now moved to set aside the nonsuit. It must be conceded that if the purchasing of these pheasants be prohibited by the statute 58 *G.* 3. *c.* 75., the plaintiff cannot maintain the action. By former statutes for the preservation of game, the selling of game was prohibited in certain cases, and the statutes on this subject were passed in order to prevent the destruction of game. The purchasers of live pheasants for the purpose of breeding are not within those statutes. The 2 *Jac.* 1. *c.* 27. *s.* 4. enacts, that every person who shall sell or buy to sell again any deer, hare, partridge, or pheasant (except partridges and pheasants reared and brought up in house or houses, or brought from beyond seas), shall forfeit for every deer, hare, or pheasant so bought 20*s.*

The statute 5 *Anne*, *c.* 14., after reciting that the existing laws were insufficient to prevent the destruction of game, by reason of the multitude of higlars and chapmen who encouraged idle persons to neglect their employment, to destroy the same, enacted by *s.* 1., that all the laws then in being for preservation of game not thereby repealed, should continue in force. *S.* 2. prohibits any higlar, chapman, &c. from selling any pheasant, &c. The exception in *s.* 4. of 2 *Jac.* 1. *c.* 27. not being repealed, was, therefore, continued by the express words of *s.* 1. of stat. 5 *Anne*, *c.* 14. The statute 28 *G.* 2. *c.* 12. was passed to remove doubts as to the meaning of the word *chapman*, and left the law in other respects as it was before. If that be so, the selling of pheasants reared in houses was not prohibited before the stat. 58 *G.* 3. *c.* 75.

Now

1828.

HELPS against GLEWISTER.

Now that stat. is entitled an act for the more effectual prevention of offences connected with the *unlawful* destruction and sale of game. It assumes, therefore, that there may be a lawful sale of game. This statute for the first time makes the buying of a hare, pheasant, &c. an offence. It recites, that selling game was already prohibited, and proceeds to subject the party buying to a penalty. But the buying is only made an offence in those cases where the selling would have been an offence before, and the selling pheasants reared in houses was not prohibited. Here it was proved that the defendant was a breeder of pheasants, and that the pheasants in question were openly exposed for sale by him in pens. It was therefore fair to presume that they were reared in a house by him. But supposing the purchase in this instance to have been within the words, it was not within the spirit of the statute, which was passed to prevent the destruction of game, whereas the object of the parties here was its preservation, the pheasants having been purchased for breeding, and a higher price paid for the hen birds with that view. In *Bridger* v. *Richardson* (*a*) it was held, that the 3 *Jac.* 1. *c.* 12., which prohibits persons from "willingly taking, destroying, or spoiling any spawn, fry, or brood of any sea fish in any wear, or other engine or device whatsoever," did not comprehend shell fish, and if it did, it meant a taking for destruction, and not a taking of oyster spawn for the purpose of removing it to beds for further growth and maturity, to make it marketable.

Lord TENTERDEN C. J. The exception in the statute

(*a*) 2 *M.* & *S.* 568.

of

1828.

HELPS against GERNISTER.

of 2 *Jac.* 1. *c.* 27. *s.* 4. is not incorporated in the statute 5 *Anne*, *c.* 14., or the 28 *G.* 2. *c.* 12., which statutes prohibit the selling and offering to sale of any game, or in the statute 58 *G.* 3. *c.* 75., which makes the buying of game an offence. The language of the 58 *G.* 3. *c.* 75. is general, and the exception in the statute 2 *Jac.* 1. *c.* 27. seems to be done away with. But if it could be engrafted on the statute 58 *G.* 3. *c.* 75., it would have been incumbent on the plaintiff to have proved at the trial that the pheasants purchased by him had been reared in a house, or brought from beyond the seas. There was no proof at the trial to bring the case within the words of that exception, I think, therefore, that in either view of the case the nonsuit was right.

Rule refused.

Friday, November 7th.

WHITNASH and Another *against* H. GEORGE and B. GIFFORD.

In an action upon a bond given to bankers, conditioned for the fidelity of a clerk, entries of the receipt of sums of money made by the clerk in books kept by him in the discharge of his duty as clerk, are, after his death, evidence against his sureties of the fact of the receipt of the money.

DEBT on bond, dated the 6th of *October* 1824. The defendant *George* suffered judgment by default. The defendant *Gifford* craved oyer of the bond and condition. The condition, after reciting that the plaintiffs had taken one *Samuel Pitman* into their service as a clerk, and that *H. George* and *R. Gifford* had agreed to enter into the bond for his fidelity in the said employ, was that *Pitman* should from time to time, and at all times, so long as he should be in the service of the plaintiffs, well and truly and faithfully account for, pay over, and deliver unto the plaintiffs, their executors, &c., or

1828.

WHITNASH against GEORGE.

&c., or to such other person or persons as they, or any or either of them should direct, all sums of money, books, papers, matters, and things of or belonging to the plaintiffs, which should at any time, and from time to time, be received by, or come to the hands of him, the said *S. Pitman*, and also did and should act and conduct himself, at all times, with fidelity, integrity, and punctuality in and concerning the matters and things which should or might be reposed in or intrusted to him as such clerk as aforesaid. Plea, that *Pitman* did from time to time, and at all times, so long as he continued in the service of the plaintiff, well, truly, and faithfully account for, pay over, and deliver unto the plaintiffs all sums of money, books, papers, matters, and things belonging to the plaintiffs, which at any time, and from time to time, was or were received by, or came to the hands of him, *Pitman*; and act and conduct himself at all times with *fidelity, integrity, and punctuality*, in and concerning the matters or things which were reposed in or *intrusted to him as such clerk* as aforesaid. Replication, that during the said time that *Pitman* so remained in the said service of the plaintiffs as such clerk, to wit, on the 7th of *October* 1824, he, *Pitman*, as such clerk, had and received, for and on account of the plaintiffs, divers sums of money, amounting to 2000*l.*, belonging to the plaintiffs, yet *Pitman*, although often requested, had not accounted for or paid over the same, or any part thereof, to the plaintiffs. Rejoinder, that *Pitman* did not as such clerk have or receive, for and on the account of the plaintiffs, the said sums of money in the replication mentioned, or any part thereof. At the trial before *Littledale* J. at the Summer assizes for the county of *Somerset* 1828, it appeared that the

1828.

WHITFIELD against GEORGE.

the plaintiffs were bankers at *Yeovill*, in *Somersetshire*; and that *Pitman* became their clerk in *October* 1824, and continued to act as such until *February* 1826, when he died. It was his duty, as such clerk, to keep the plaintiffs' books. In order to prove that *Pitman* was indebted to the plaintiffs at the time of his death, on account of money received by him in his character of clerk, the plaintiffs produced the book kept by him, in which there were entries in his hand-writing of various sums of money received by him during the time he continued in their service as clerk. It was objected, that although these entries would have been evidence against *Pitman*, they were not evidence against the defendants, who were his sureties. The learned Judge received the evidence, and directed a verdict to be found for the plaintiffs, but reserved liberty to the defendants to move to enter a nonsuit.

Merewether Serjt. now moved accordingly. The entries in the books were not admissible in evidence against the defendants. They were not the best evidence of the money having been received by *Pitman*. The parties who paid the money to him might have

1828.

WHITNASH against GEORGE.

appointment to a *public* office, conditioned for payment of all monies received, and further, that the principal should from time to time enter into certain books all monies by him received, entries in such books by the principal were after his death evidence against the surety. But the decision in that case proceeded on the ground that the books were public books.

Lord TENTERDEN C. J. It appears by the recital in the condition of the bond, that the plaintiffs had agreed to take *Pitman* into their service as a clerk, and that the defendants had agreed to become bound for his fidelity in the said employ; and the condition was, that *Pitman* should well and truly account for, pay over and deliver to the plaintiffs, or to such other persons as they should direct, all sums of money, books, papers, matters, and things belonging to the plaintiffs, which should come to his *Pitman*'s hands. The defendants plead general performance. The plaintiffs reply, that *Pitman*, as such clerk, had received, for and on account of the plaintiffs, divers sums of money belonging to the plaintiffs, and had not accounted for or paid over the same to the plaintiffs. The defendants rejoin, that *Pitman* did not, as such clerk, have or receive, for and on the account of the plaintiffs, the said sums of money in the replication mentioned; and upon that allegation issue is joined. It lay upon the plaintiffs, therefore, to shew that *Pitman* did have and receive sums of money for which he had not accounted. In order to prove that fact, the plaintiffs produced the books kept by *Pitman* in discharge of his duty as their clerk. Those books contained entries made by him, whereby he charged himself with various sums as having

1828.

WHITNASH *against* GEORGE.

ing been received by him on account of the plaintiffs. The question, therefore, is, whether those entries be evidence after his death against the defendants, who bound themselves to the plaintiffs that he should faithfully discharge his duty as clerk, and account to the plaintiffs or to their nominee. I think those entries whereby he charged himself with sums of money as having been received by him for the plaintiffs, were admissible in evidence against the defendants in an action on the bond, whereby they became bound that *Pitman* should faithfully discharge his duty as clerk. It is part of the duty of a banker's clerk to make entries (in the books kept by him) of all sums of money received by him for his employers. Such entries made by the clerk must, as against his sureties, who contracted for the faithful discharge of his duty, be taken primâ facie to have been made by him in discharge of that duty. I think, therefore, that in this action the entries made by *Pitman* (in those accounts which it was his duty as the clerk of the bankers to keep), whereby he charged himself with the receipt of sums of money, were after his death admissible evidence of those sums having been received by him, not altogether as declarations made by him against his interest, but because the entries were made by him in those accounts which it was his duty as clerk to keep, and which the defendants had contracted that he should faithfully keep.

BAYLEY J. The foundation of the decision in *Goss* v. *Watlington* (*a*) was, that the entries made by the collector were admissible, not merely as a declaration

(*a*) 3 *Brod. & Bingh.* 132.

made

1828.

WAINWRIGHT against GEORGE.

made by him against his interest, but on the ground that they were entries in those very books, which by the condition of the bond the principal was bound faithfully to keep. The entries were evidence against the surety, because they were made by the collector in pursuance of the stipulation contained in the condition of the bond. That case in principle is the same as the present.

Rule refused.

ALLEN and Another, Assignees of SCOTT, a Bankrupt, *against* SUGRUE.

Saturday, November 9th.

Where a vessel insured in a valued policy at 2000*l.* received damage by perils of the sea which could have been repaired for 1450*l.*, but the jury found that the vessel was not worth repairing: Held, that this was a total loss, and the assured were entitled to recover the sum at which the vessel was valued in the policy.

ASSUMPSIT against the secretary of the *St. Patrick's* Assurance Company on a policy effected by the bankrupt on the ship *Benson*, valued at 2000*l.*, for twelve months from the 3d of *December* 1825, averring a total loss by perils of the sea. The defendants paid money into court to cover an average loss, and pleaded the general issue. At the trial before *Bayley* J. at the last Summer assizes for *Newcastle-upon-Tyne*, it was proved that the policy was duly executed, and that the *Benson* was afterwards stranded at the entrance of the *Hull* dock. That it would have cost about 1450*l.* to repair her, and that when repaired she would not have been worth that sum. For the defendant it was contended, that the plaintiffs could not recover for a total loss; as in that case they would receive 2000*l.*, whereas the cost of repairing the damage done to the ship would not be more than 1450*l.*; and that, as sufficient was paid into

 court

1828.

ALLEN against SUGRUE.

court to recover a loss of 1450*l.*, the plaintiffs must be nonsuited. The learned Judge reserved the point, and left it to the jury to say whether the ship was worth repairing, and they found that she was not, and a verdict was entered for the plaintiffs for a total loss. In *Michaelmas* term,

F. Pollock moved for a rule nisi to enter a nonsuit. The utmost that the assured can claim is an indemnity. If, therefore, the underwriters are prepared to pay the amount of repairs necessary, or themselves to undertake the repairs, the assured have no right to take the actual value for the purpose of converting mere damage into a constructive total loss, and then to call upon the underwriters to pay the agreed value in the policy. If the agreed value is to bind the underwriters in ascertaining the amount of the loss if total, it ought equally to bind the assured in estimating whether the loss was total or not. [Lord *Tenterden* C. J. Can there be a different rule in ascertaining whether a loss be total or not in an open policy and a valued policy?] The rule, if carefully examined, is really the same; but a constructive total loss is in fact not a total loss. The ship in this

ing to which the underwriter is to pay. In a valued policy, the criterion ought also to be the same, viz. that according to which the underwriter is to pay, that is the agreed value. The effect of allowing the assured to claim as he has in this case is unjust, as it gives him much more than an indemnity for a loss which (by whatever name it be called) is a mere case of damage. Where the loss is in fact total, the underwriter cannot complain of being called on to pay the full agreed value in lieu of the ship which he cannot restore; but where the loss is not in fact total, it is sufficient to put the assured in as good a situation as he would have been in had the loss not occurred. A constructive total loss, as it is called, may arise in various ways, not merely by a ship not being worth repairing, but by certain charges upon her exceeding her actual value. Suppose a case of salvage, the vessel remaining not only as an existing ship, but absolutely uninjured by the circumstances which gave rise to the salvage, could the assured say this is a constructive total loss, if we were uninsured we should not pay the salvage, and, therefore, we call on you for the total loss? Or, might not the underwriters say, we will pay you the salvage, and restore you your vessel undamaged, and what more can you require? There is, besides, this mischief in allowing the assured thus to estimate the loss on a valued policy: that as long as there would be a surplus of the smallest amount after repairing the vessel, the loss is not to be deemed total, but an average loss only, and the assured can claim the repairs only; but if the repairs required go the least beyond that point, the loss is to be deemed total, and the assured may demand the agreed value.

 A dif-

1828.

ALLEN against SCHRUZ.

A difference, therefore, of 5*l.* in the damage, may make a difference of several hundred pounds in the loss. In this case, if the repairs necessary had been only 1400*l.*, the underwriters would have been liable to that only, and might have deducted one-third new for old. But being 1450*l.*, the vessel is not worth repairing, and the underwriters are called on to pay 2000*l.* An increase, therefore, of the damage by 50*l.*, makes a difference to the underwriters of near 1000*l.* The fallacy seems to arise from calling this a *constructive total loss*, which, though a convenient expression, really means a state of things in which the loss is not total.

Lord TENTERDEN C.J. I am of opinion that the question, whether the loss sustained is a partial or total loss, is precisely the same where the value of the ship has been mentioned in the policy, and where that has been left open. If the value has not been mentioned, it must be ascertained by evidence; if it has been mentioned, then all further inquiry is unnecessary, as the parties have agreed as to what shall in the event of loss be considered the value. If underwriters find by experience that the practice of entering into valued

1828.

ALLEN *against* SUGRUE.

and that is the sum agreed upon as the estimated value of the ship, minus the value of the materials saved.

BAYLEY J. I think that the question whether a loss is total or not depends upon the facts of the case, and the nature and extent of the damage done to the ship; and not upon the nature of the policy effected upon her. Whether that is valued or open cannot alter the nature of the loss. The only difference between them is, that in the one case the assured must prove the value of the thing insured; in the other he need not.

Rule refused.

ALLEN and Another, Assignees of SCOTT, a Bankrupt, *against* MORRISON.

Saturday, November 9th.

Where the members of a mutual insurance club all executed the same power of attorney, severally authorising the persons therein named to sign the club policies for them, held, that it required only one stamp.

ASSUMPSIT, by the same plaintiffs as in the last case, on a policy of insurance on the ship *Benson*, effected by *Scott* in a mutual insurance club, of which *Scott* and the defendant were members. Plea, the general issue. At the trial before *Bayley* J., at the last Summer assizes for *Newcastle-upon-Tyne*, it appeared that each member of the club had a ship insured therein; that a power of attorney was executed by all the members, whereby they severally appointed certain persons their attornies to execute policies on the ships admitted into the club, by virtue of which they signed each policy with the names of all the members of the club, except that of the owner of the ship insured; and the sum under-written by each member was regulated by the value of his own ship. The power of attorney was

1828.

ALLEN against MORRISON.

produced in order to shew an authority to subscribe the policy in question with the defendant's name; when it appearing that it had only one stamp of 1*l.* 15*s.*, it was objected, that as it was a several power given by each member of the club to the persons therein named, there ought to have been a separate stamp for each. The learned Judge overruled the objection, but gave the defendant leave to move to enter a nonsuit; and the plaintiffs having obtained a verdict,

Cresswell now moved accordingly. The general rule upon this subject, as laid down in *Phillipps on Evidence* (*a*), has been recognized in a variety of cases. It is as follows: "If the interest of the parties relates to one thing, which is the subject-matter of the instrument, or in other words, if the instrument affects the separate interest of several, and there is a community of the same subject-matter as to all the parties, there a single stamp will be sufficient; but where the parties have separate interests in several subject-matters, there ought to be a separate stamp for each party." Upon this principle, it was held, that an agreement whereby several persons separately agreed to advance certain sums of money to

1828.

ALLEN *against* MORRISON.

to that of all the other members, he is the assured, they are the insurers; the same purpose is no longer common to them all, his object is then to be insured, not to insure others; to receive an indemnity, not to grant one. Suppose two persons, instead of twenty or more, were to execute a several power of attorney to *A. B.*, authorizing him to sign policies whereby the two principals should insure each other, it could not be said that there was any community of interest, or any common purpose, or the same subject-matter to be insured by each; and if that be so, it is clear that in the present case there was not a community of interest or of purpose throughout.

Lord TENTERDEN C. J. I am of opinion that one stamp was sufficient for the power of attorney in question. There was certainly a community of purpose actuating all the members of this club, viz., that each should be insured by all the others. And although it may perhaps be said that there was not an entire community of interest, that is not sufficient to make several stamps necessary.

Rule refused.

1828.

Thursday, November 11th.

H. B. Coles, Administrator of C. Coles, *against* Hulme.

The condition of a bond recited that *A.* was indebted to *B.* in various sums of money, which were all stated in pounds sterling, and money of a smaller denomination, and that the bond was given to secure payment of those sums. In the obligatory part of the bond the word *pounds* was omitted; it merely stated that the obligor became bound in 7700, without stating what description of money: Held, that from the condition the intent manifestly was, that

DECLARATION by the plaintiff, as administrator of *Catherine Coles* deceased, on a bond bearing date the 1st of *June* 1808, for 7700*l.* Plea, after craving oyer of the bond and condition, non est factum. At the trial before Lord *Tenterden* C. J. at the *London* sittings after last term, it appeared upon the production of this bond, that the word "*pounds*" in the obligatory part of the bond had been omitted. The penalty was merely described as 7700, without any species of money being mentioned. The condition of the bond recited an indenture of the 5th of *January* 1807, whereby *P. Coles* and *J. C. Burckhardt* agreed to become partners in trade for seven years, with a stipulation, that if either party should happen to die before the expiration of that time, the survivor should for two years afterwards carry on the trade for the benefit of the survivor and the executors of the deceased partner, on the same terms as

[redacted]

1828.

COLES against HULME.

all debts; and upon executing such bond the executors of the deceased partner were to assign to the surviving partner all the joint property in the stock in trade. It then recited that *P. Coles* died on the 19th of *September* 1808, and appointed *Catherine Coles* his executrix; and that *P. Coles* had in his lifetime advanced to the joint trade 1500*l.*, exclusive of 1000*l.* advanced to *Burckhardt*, and secured to *P. Coles* by the bond, and that those sums were still due; and that *C. Coles* and *Burckhardt* had, in lieu of carrying on the trade in partnership for two years, agreed to dissolve the same immediately; and that, in lieu of the profits of the moiety of the business for those two years, *Burckhardt* should pay *C. Coles* 1000*l.* in the manner thereinafter mentioned, as a full compensation to her for all the profits which she would have been entitled to if the trade had been carried on for the space of two years. It then recited, that the co-partnership property had been valued at 4718*l.* 2*s.* 7*d.*, and that *C. Coles* had assigned to *Burckhardt* her moiety in the stock in trade, and that the latter had indemnified *C. Coles* against all claims arising out of the co-partnership; and that it had been agreed that *Burckhardt* and the defendant should enter into the bond for securing to *C. Coles*, her executors, &c. the payment of the several sums of 1000*l.* and 1500*l.* so advanced by *P. Coles* to the joint trade, and of the sum of 2359*l.* 1*s.* 3½*d.*, being one moiety of 4718*l.* 2*s.* 7*d.*, the value of the partnership effects. The condition of the bond then was, that if *Burckhardt* should pay to *C. Coles* the full sum of 1000*l.*, with interest by instalments as therein mentioned; and also the sum of 1500*l.* on the 1st day of *November* then next, being the money advanced by *P. Coles* in his lifetime to the joint trade;

and

1828.

COLES against HOLMES.

and also, on the 1st of *January* 1809, 1179*l.* 10*s.* 7¾*d.*, being one moiety of the sum of 2359*l.* 1*s.* 3½*d.*, the moiety of the value of the partnership effects; and on the 1st day of *January* 1810, the further sum of 1179*l.* 10*s.* 7¾*d.*, being the remaining moiety of the said sum of 2359*l.* 1*s.* 3½*d.*, together with interest, the bond was to be void. It was objected by Sir *James Scarlett* that the bond was void for uncertainty, because it did not specify any description of money; it might, therefore, be marks, guineas, or pounds. Lord *Tenterden* C. J. was of opinion, that as it appeared by the condition that the bond was given to secure various sums of money described as being composed of pounds, &c. it might fairly be inferred that the penal part of the bond which was given to secure the payment of those sums should be in the same species of money, and that in furtherance of that intention the word "pounds" might be supplied; and he directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit.

Sir *James Scarlett* now moved accordingly. In every obligation there must be an obligor, an obligee, and a sum

[redacted]

the sum be expressed ungrammatically, the defect may be supplied where the intention of the parties can be collected; as where the obligation was in octaginta libris with a condition to pay 40*l.*, it was adjudged a good obligation for octoginta libris, 10 *Coke*, 133. *a.*, and *Com. Dig.* tit. *Obligation* (B), 3.; where several other instances are collected. But there is no case where the entire omission of the number of pounds has been supplied. On the contrary, it was declared by the Court in *Loggins* v. *Titherton* (*a*) that such an omission would render the bond void; and if so, upon the same principle, the omission of the description of money in which the party is bound must render the bond void. Accordingly, a bond whereby a man is bound in twenty *liveries* is void, because it does not appear that it was intended *libris*, *Com. Dig. Obligation*, (B) 5., or in viginti literis, instead of libris, *Partrose*'s case, cited in *Hills* v. *Cooper* (*b*). If, however, it be only improperly expressed, as *ponds* instead of *pounds*, the defect may be supplied if the intent of the parties be apparent. There is no instance where the total omission has been remedied. The bond, therefore, in this case must be void, unless the omission of the word *pounds* can be supplied by reference to some other part of the bond. The obligatory part of the bond furnishes no materials for that purpose. The inference, if it can be made at all, must be made from the condition. The bond and condition certainly form but one instrument, but they are separate and distinct in their nature. There is no necessary dependence or connection between them. The condition may be void and the bond remain good. If the condition be in-

(*a*) *Yelv.* 225. (*b*) *Cro. Jac.* 603.

sensible,

1828.

COLES against HOLMES.

sensible, or to do an impossible act, the bond will be single. If the bond be void from the omission of some essential part, it cannot therefore be supplied by the condition. Assuming, however, that the condition may be referred to for that purpose, it does not furnish sufficient materials to raise the inference. The condition, indeed, contains a recital that the parties had agreed to execute the bond for securing the payments of the several sums therein mentioned, which are stated in pounds sterling. This recital is only declaratory of an intention to make a valid bond. But such a declaration will not supply the defect of necessary forms. It is no more than what might be said in every case where parties execute informal instruments. In such cases they always mean to act effectively. Here they have not executed the bond which they intended; for it cannot be said for what amount it was to be taken as a security. The money payable by the condition is estimated in pounds, but the number mentioned in the obligatory part of the bond does not, as usual, amount to double the number of pounds which appears by the recital in the condition to be payable. The object of the parties might as well be obtained by the insertion (in

does not shew the intent." The condition there was perfectly clear. But the bond was held to be void by reason of the uncertainty as to the extent of the penalty.

Lord TENTERDEN C. J. In every deed there must be such a degree of moral certainty as to leave in the mind of a reasonable man no doubt of the intent of the parties. The question in this case is, Whether there is in this bond that degree of moral certainty as to the species of money in which the party intended to become bound? I thought at the trial there was. The obligatory part of the bond purports that the obligor is to become bound for 7700. No species of money is mentioned. It must have been intended that he should become bound for some species of money. The question is, Whether from the other parts of the instrument we can collect what was the species of money which the party intended to bind himself to pay? [His Lordship then read the recitals in the condition, and proceeded as follows:] It appears, therefore, that the intent was that the defendant should enter into a bond for securing to *P. Coles* various sums of money, described in these recitals as being composed of pounds sterling and other money of a smaller denomination. That being so, I cannot entertain any doubt that the intention was that the obligor should, in order to secure the payment of those sums, become bound in a penalty consisting also of pounds sterling; and if that were the intention, then the bond ought to be read as if the word *pounds* were inserted in it.

BAYLEY

1828.

COLES against HULME.

BAYLEY J. It has been decided, that in furtherance of the obvious intent of the parties, even a blank may be supplied in a deed (*a*). In *Waugh* v. *Russell* (*b*), the word hundred was omitted in the latter part of the condition of a bond. It was held that it might be supplied, and that in pleading the bond might be described according to its legal effect, as if the word hundred had been inserted in it. I think in this case that it is obvious that the obligor meant to bind himself in a penal sum consisting of pounds sterling, and, therefore, that the omission of the word pounds may be supplied.

LITTLEDALE J. I have entertained some doubts whether the word pounds could be supplied; but, upon the whole, I think it sufficiently appears, from the recital in the condition of the bond, to have been the intention of the parties that the penal part of the bond, which was to secure the payment of various sums stated in the condition in pounds sterling, should also be *pounds*.

Rule refused.

(*a*) The case alluded to by the learned Judge was, probably, that of *Lloyd* v. *Lord Say and Sele*, 10 *Mod.* 46. There the name of the bargainor was omitted in the operative part of a bargain and sale, and it was supplied

1828.

CARPENTER *against* BLANDFORD.

Thursday, November 11th.

A. agreed to sell to *B.* his interest in a public-house, and his furniture, &c. at an appraisement to be made by two appraisers, the same to be paid for on *B.*'s taking possession, which was to be on or before the 25th of *March* then next; and 30*l.* was paid by *B.* as a deposit; and he agreed that if he should not complete his part of the agreement, the sum so paid should be forfeited. The buyer and seller appointed appraisers respectively. On the 25th of *March* the two appraisers met, and the seller's appraiser was then informed that the appraiser of the buyer could not conveniently on that day complete the valuation, but would finish the business the next day; no objection was then made to the proposed delay. The appraiser of the buyer went to the seller's premises the following day to make the valuation, but the seller refused to allow him so to do, and said he would not complete the contract: Held, that, under the circumstances, it was incumbent on the seller, if he intended to insist that the contract should be completed on the day mentioned in the agreement, to have notified such intention to the buyer; and not having so done, that the latter was entitled to recover back the deposit.

ASSUMPSIT for money had and received. Plea, the general issue. At the trial before Lord *Tenterden* C. J., at the *Middlesex* sittings after last term, the following appeared to be the facts of the case: — By an agreement of the 25th of *February* 1828, for the sale of the interest in a public-house and stock in trade of a publican, between the plaintiff and defendant, in consideration of 262*l.* to be paid as good-will to the defendant, he agreed to sell to the plaintiff his interest as tenant at will in a public-house, and all his household furniture, goods, fixtures, and effects on the premises at a fair appraisement, to be made by two appraisers or their umpire, and all his stock in trade, the value of such stock to be ascertained by two proper persons or their umpire; in consideration of which the plaintiff agreed to accept the said house and premises as tenant at will, and pay the sum of 262*l.* good will, and to purchase the household furniture, goods, fixtures, stock, and effects upon the premises at a fair valuation to be made in the manner above stated, and to pay for the same at the time of his taking possession of the premises, which it was mutually agreed by the parties should be on or before the 25th of *March* 1828, and as

earnest

1828.

CARPENTER against BLANDFORD.

earnest of the agreement, the plaintiff had paid into the hands of the defendant the sum of 30*l.*, to be allowed in part payment on the completion of the agreement, but should the plaintiff not complete his part of the agreement, the said sum of 30*l.* paid as a deposit was to become forfeited; and it was further agreed, that either of them not performing all and every part of the agreement, the party defaulting should pay to the other 100*l.* as liquidated damages; and further, that should Messrs. *Calvert* and Co. refuse to accept the plaintiff as tenant, the deposit money was to be returned, and the agreement was to be void. It appeared that the plaintiff and defendant had appointed appraisers respectively to make the valuation of the furniture, stock, &c. mentioned in the agreement. On the 25th *March* the defendant's appraiser was informed by the plaintiff's appraiser that he was so busy on that day that he could not complete the valuation of the defendant's stock in trade on that day, but that he would on the following day. No objection was then made to the delay. The plaintiff attended with his appraiser at the defendant's premises at nine o'clock on the following morning; but the defendant told him he had come too late, that he

that as the defendant's agent was told on the *Tuesday* that the plaintiff's appraiser could not attend on that day, but would on the day following, he, the defendant, was bound, if he meant to avail himself of the strict rule of law that the contract should be performed on the day mentioned in the agreement, to send notice to the plaintiff that he would insist that the contract should be completed on that day; and he directed the jury to find a verdict for the plaintiff.

Sir *James Scarlett* now moved for a new trial, and contended that the time fixed for the completion of the contract was at law an essential part of the contract, *Berry* v. *Young* (*a*), *Lloyd* v. *Collett* (*b*). Here, therefore, the plaintiff was bound by the terms of the agreement to be ready to complete his contract on the 25th of *March*; he made default, and then by the terms of the agreement the deposit was forfeited.

BAYLEY J. The defendant in this case insists on a forfeiture, which is strictissimi juris. He ought, therefore, to shew that he has done every thing which he was bound to do to entitle him to insist on the forfeiture, and that he has not done any thing to waive that right. It appears by the agreement between the parties, that the contract was to be completed on the 25th of *March*. The stock in trade was to be valued by appraisers. Each party had appointed one. On the 25th of *March* the plaintiff's appraiser informed the appraiser appointed by the defendant that he, the plaintiff's appraiser, would not be able to finish the

(*a*) 2 *Esp.* 640. (*b*) 4 *Bro. C. C.* 469. 4 *Ves.* 698.

1828.

CARTMORE against BLANDFORD.

valuation until the day following at three o'clock; to which the defendant's appraiser made no objection. It was the duty of the defendant's agent to inform his principal that such a communication had been made by the plaintiff's agent; and it must be presumed that he did so. If that communication was made, and the defendant meant to insist on the forfeiture, it was his duty to inform the plaintiff that he should insist on the forfeiture unless the contract was completed on that day. Such communication not having been made, I think the plaintiff was entitled to recover back the money deposited.

LITTLEDALE J. concurred.

Rule refused.

Thursday, November 11th.

PATTISON *against* JONES.

A. having discharged his servant, and hearing that he

DECLARATION stated that the plaintiff, before, &c., had been retained and employed in the service of the defendant as his butler and servant; and

1828.

PATTISON against JONES.

gained the good opinion of all his neighbours, &c. but had also supported himself, and would thereafter have supported himself by his exertions in the service of his masters and employers, had not such grievances been committed as thereinafter mentioned; that the plaintiff before, &c. had applied to be employed by and in the service of one *A. F. Mornay* as a butler and servant, yet the defendant well knowing the premises, but contriving, &c. to cause it to be suspected and believed by those neighbours, &c. and particularly by *A. F. Mornay*, that the plaintiff was not fit to be employed or trusted as a servant, and that he had been guilty of drunkenness, absence from duty, and misconduct, and that he had made free with, and stolen and purloined the wines of the defendant whilst the plaintiff was in the service of the defendant as butler aforesaid; and thereby to prevent *A. F. Mornay* from employing him, plaintiff, in his service, and to wholly ruin him and to deprive him of the means of supporting himself by honest and industrious means, on, &c. at, &c. wrongfully and maliciously did write, compose, and publish a certain false, malicious, and defamatory libel of and concerning the plaintiff, and of and concerning the conduct of the plaintiff whilst he was in the service of the defendant, in the form of a note or letter directed to *A. F. Mornay*, containing therein the false, malicious, defamatory, and libellous matter, &c. &c. of and concerning, &c. that is to say, "Sir (meaning the said *A. F. Mornay*), Having been informed that you had an intention of taking my butler into your service, I feel it incumbent upon me as a neighbour to inform you that I have just discharged him for misconduct, and that I

1828.

PATTISON against JONES.

cannot feel myself justified in recommending it to you to engage him; I have been rather surprised that you have not applied to me for his character, but I shall not think any more about it." A second count charged the defendant with publishing the following libel: "I (meaning the defendant) have no hesitation in informing you that I discharged my butler, not only on account of drunkenness and absence from his duty in my house, but on account of my having great reason to believe that he had made free with a great deal of my wines, &c. in which I found a very great deficiency upon an examination with the cellarman who packed it up to be brought down to *Putney*, who took a regular account of it, which I have got. *Pattison* had the audacity to open all those packages without any authority from me; and he acknowledged that fact yesterday before witnesses, when he was so conscious of his misconduct that he said he would not take any situation in the neighbourhood of *Putney*." By means whereof the plaintiff had been greatly injured in his good name and character amongst his neighbours and other subjects, and particularly with the said *A. F. Mornay*, insomuch that they had hitherto suspected and be-

1828.

PATTISON against JONES.

so retained and employed as last aforesaid, but had hitherto continued and still was out of service and employ, and deprived of the means of supporting himself, and was otherwise greatly injured and damnified and almost wholly ruined. Plea, general issue. At the trial before Lord *Tenterden* C. J., at the *Middlesex* sittings after last term, the plaintiff proved the handwriting of the defendant to the two letters set out in the declaration, and the following letter of Mr. *Mornay* to which that set out in the second count was an answer: "Sir, — It is necessary that you should state the particulars of the misconduct of your steward to determine me to deprive him of the situation for which he has applied to me. Is he sober and honest? You will of course consider that there ought to be strong grounds for depriving a man of his character and his bread;"— and claimed to recover damages for the libel set out in the second count, but abandoned the first count, and all claims for special damage. It was objected by the defendant, that as it appeared that the letter containing the alleged libel was written to a third party, who had invited the defendant to give him a character of the plaintiff, it was primâ facie a privileged communication; and that it therefore lay on the plaintiff to shew malice in fact, or that the defendant was actuated by ill-will towards the plaintiff(*a*). To this it was answered by the counsel for the plaintiff, that in an ordinary case where a master is called upon by a third party to give a character to a servant, and communicates slanderous matter, it is supposed to be done in discharge of a duty, and is a

(*a*) See *Bromage* v. *Prosser*, 4 *B.* & *C.* 247.

1828.

Parkinson against Jones.

privileged communication, the inference of malice in law resulting from the nature of slanderous matter being rebutted by the occasion on which that matter is written or spoken. In that case it is incumbent on a plaintiff to prove malice in fact. But in this case the defendant wrote the first letter without being required so to do. That letter imputes misconduct to the plaintiff, and invited the third party to make further enquiry. The writing of that letter, under those circumstances, was evidence to go to the jury that the defendant was actuated by malice in fact or ill-will against the plaintiff. Lord *Tenterden* was of opinion that under the circumstances of this case it was a question for the jury whether the defendant when he wrote the second letter acted bonâ fide. The defendant's counsel then proposed to call witnesses to prove the truth of the statements, in order to shew that they were made bonâ fide. Lord *Tenterden* received the evidence, but expressed doubts whether it was admissible under the general issue; and he finally directed the jury to find for the defendant if they thought from the evidence that he made the communication bonâ fide, but for the plaintiff, if they thought he made the communication with the intention to injure the plaintiff.

racter in which the slander is spoken or written, and to shew that the master was actuated by ill-will towards him, the servant. Here it appeared by the cross-examination of the plaintiff's witnesses that he, the plaintiff, had been in the service of the defendant, and by the contents of the second letter, it appeared that it was written in answer to one from Mr. *Mornay*. The matter contained in that letter was a privileged communication, and therefore it lay upon the plaintiff to give evidence that the defendant was actuated by malice in fact. It is true that the defendant first wrote to *Mornay* without being called upon so to do. But it is the duty of every man who knows that another is about to receive into his service one who has been guilty of the misconduct imputed to the plaintiff, to communicate to that other the fact of such misconduct. The primâ facie presumption therefore was, that the defendant's intention was innocent, and no evidence was given to rebut that presumption.

Lord TENTERDEN C. J. It appeared in the case proved on the part of the plaintiff that the defendant wrote the first letter to Mr. *Mornay*, without being called upon by him so to do. The second letter, which contained the libellous matter in respect of which the plaintiff claimed to recover damages, was certainly written in answer to enquiries made by *Mornay*; but inasmuch as those enquiries were invited by the defendant, I thought it was a question for the jury, whether the communication contained in that letter was made by the defendant bonâ fide, acting under a belief that he was discharging a duty which he owed to the party who was about to take the plaintiff into his service, or whether it was made maliciously with an intention of doing an in-

1828.

PATTISON against JONES.

jury to the plaintiff. The jury found that it was made maliciously, which entitled the plaintiff to a verdict.

BAYLEY J. Assuming that the libel set out in the second count was a privileged communication, it seems to me that the case was properly submitted to the jury. Generally speaking, any thing said or written by a master when he gives the character of a servant is a privileged communication. If a servant, therefore, charge a master with publishing a libel, it is competent to the latter, under the general issue, to prove that the alleged libel was written under such circumstances as to make it a privileged communication, and thereby throw on the plaintiff the necessity of shewing that it does not come within that protection which the law gives to a privileged communication. But if the supposed libel be not communicated bonâ fide, it does not fall within the protection which the law extends to privileged communications. Here the second letter of the defendant was written in answer to one calling upon him to give an account of the plaintiff's conduct, but the defendant wrote his first letter without being called upon so to do. I do not mean to say that in order to make

1828.

PATTISON *against* JONES.

slanderous matter, come within the scope of a privileged communication. But in such a case it will be a question for the jury, whether the defendant has acted bonâ fide, intending honestly to discharge a duty; or whether he has acted maliciously, intending to do an injury to the servant? In forming their judgment, the jury in this case were bound to take into their consideration the fact of the defendant's having voluntarily put himself into motion, and thereby in effect having, by the first letter, desired Mr. *Mornay* to put questions to him. These questions were put, and gave occasion to the second letter. The question for the jury to consider was, whether the defendant acted honestly and bonâ fide in making the representation contained in that letter? The jury had that question submitted to their consideration, and they were of opinion that the communication was not made bonâ fide, but that it was made with the intention to injure the plaintiff; and if it was made with that intention, it was not a privileged communication.

LITTLEDALE J. It seems to me that the letter, taken by itself, is a libel; but if it was a privileged communication, it was not necessary for the defendant to plead a justification, he might make that a defence on the general issue, and give evidence to satisfy the jury, that under the circumstances of the case it was a bonâ fide communication. That question was properly submitted to their consideration, and they have come to a conclusion that it was not made bonâ fide, and that the defendant was actuated by malice. I perhaps should not have come to the same conclusion; but I think the verdict ought not to be disturbed. Upon the question, whether a master who has written a libel in giving the character

1828.

PATTISON against JONES.

character of a servant has acted bonâ fide or not, it may make a very material difference whether he volunteered to give the character, or had been called upon so to do. At all events, when he volunteers to give the character, stronger evidence will be required that he acted bonâ fide, than in the case where he has given the character after being required so to do.

Rule refused.

Friday, November 12th.

It is the duty of a party effecting an insurance on life or property, to communicate to the underwriter all material facts within his knowledge touching the subject matter of the insurance; and it is a question for the jury whether any particular fact was or was not

LINDENAU *against* DESBOROUGH.

ASSUMPSIT against the secretary of the *Atlas* Insurance Company on a policy of insurance on the life of the Duke of *Saxe Gotha*. Plea, the general issue. At the trial before Lord *Tenterden* C. J., it appeared that in 1824 an insurance was effected on the life of the Duke with the *Union* Assurance Company. That company had an agent in *Germany*, who, on behalf of his principals, submitted certain questions to the physicians of the duke, many of them as to specific diseases, and his habits of life; and the last was, "Is there any other circumstance within your knowledge

1828.

LINDENAU *against* DEADBOROUGH.

contradicted by the medical men; and as little as we believe that this has any influence on his natural life, we find it our duty to mention it." The physicians in one of their answers said the duke was *hindered* in his speech, but did not mention the state of his mental faculties. An application was made to the *Union* to insure a further sum on the duke's life; but that being contrary to their general rules, their agent handed over the proposal to the *Atlas*, and at the same time gave the latter company the private answers received from their agent in *Germany*. The plaintiff signed the usual declaration, and declarations by the duke's physicians were made to the *Atlas* similar to those made to the *Union*. Upon receiving these documents the *Atlas* entered into the policy. In 1825 the duke died, and it was then discovered that there had existed in his head for many years a large tumour pressing on the brain, to which the loss of speech and mental faculties might be attributed; but all the medical testimony went to establish that the symptoms during the duke's life were not such as were likely to excite the suspicion that such a tumour existed, or that he was afflicted with any particular disorder tending to shorten life. One foreign physician, however, said, that had he been consulted he should have thought it right to state that he attributed the loss of speech to a paralysis of the organs of speech. And an *English* surgeon called for the plaintiff, on cross-examination said he should, in answer to the general question, "Whether he knew any other circumstances that ought to be communicated to the directors?" have thought it right to mention the state of the duke's mental faculties. Upon hearing this evidence Lord *Tenterden* told the plaintiff's counsel he thought it made an end

1828.

LINDENAU against DESBOROUGH.

end of his case; and he should leave it to the jury to say whether there were any facts material to be known which were not mentioned to the assurers, and that if there were, the policy was void. The plaintiff's counsel thereupon elected to be nonsuited, leave being given to him to move for a new trial, on the ground of misdirection.

Brougham now moved accordingly. The proposed direction to the jury cannot be supported, inasmuch as it referred the materality of the fact not mentioned to the judgment of the jury, and not to the opinion of the party making the declaration. To specific questions the party must truly answer whether they are material or not; but to a general question the answer is sufficient, unless the party conceal that which he believes to be material. If the contrary were the law, no policy could be effected with safety, for the most skilful men differ upon such questions; and a party having bonâ fide given all the information that a skilful adviser thinks material may afterwards find his insurance of no avail, because another person at some future time thinks a fact not mentioned was material. [*Bayley* J. Can you support the position that the materiality is to de-

1828.

LINDENAU *against* DEBOROUGH.

been directed was set aside: but it is also a question for the jury whether the party believed the fact to be material. But, secondly, supposing the materiality to have been properly referred to the jury in this case, it should have also been left to them to say whether the insurers had not information aliunde of the fact omitted by the physicians. In *Carter* v. *Boehm* (*a*), Lord *Mansfield* says, "An underwriter cannot insist that the policy is void because the insured did not tell him what he actually knew; what way soever he came to the knowledge." Now it appeared in evidence that the private communication made to the *Union* Assurance Company had been delivered over to the *Atlas*, and in that the duke's loss of speech and the imbecility of his mental faculties were mentioned. Thirdly, the fact of the duke's want of mental faculty did not affect his apparent bodily health; no one of the medical witnesses affected to say that he should have considered the risk increased on that account, and taking the case most strongly against the assured, he warrants a state of apparent bodily health. Now the assured need not mention any thing covered by the warranty, *Haywood* v. *Rodgers* (*b*); and had such a warranty been expressed in this case, the question for the jury would have been, whether the party was in a reasonably good state of health, and such a life as ought to be insured on common terms, *Ross* v. *Bradshaw* (*c*), and the jury must have answered such a question in the affirmative. [*Bayley* J. In *Bufe* v. *Turner* (*d*), it appeared that the plaintiff was possessed of several warehouses; one of which was adjoining to a

(*a*) 3 *Burr.* 1910.
(*b*) 4 *East*, 590.
(*c*) 1 *W. Bl.* 312.
(*d*) 6 *Taunt.* 338.

boat-

1828.

LINDENAU against DESBOROUGH.

boat-builder's shop. A fire broke out in this shop, but was subdued and apparently extinguished. The plaintiff immediately afterwards sent an order to effect an insurance on his premises. On the following morning the fire again broke out at the boat-builder's, and consumed the plaintiff's warehouses. The jury acquitted the plaintiff of any fraud or dishonest design, but thought he should have communicated to the underwriters the circumstance of the fire that had happened before he ordered the insurance; and because he did not do so returned a verdict for the defendant, and the Court afterwards refused to grant a new trial.] The report does not state on what ground the new trial was refused.

Lord TENTERDEN C. J. At the trial before me amongst other depositions that of a foreign physician named *Stark* was read, wherein he stated that he would have certified that the duke was in bodily health, but that he would not have failed to observe that he laboured under an inability to speak, which he attributed to a paralytic state of the nerves of the organs of speech. In addition to this, Mr. *Green*, a surgeon, stated, that

1828.

LINDENAU against DESBOROUGH.

Muspratt (*a*), which was tried before me at *Lincoln*. By the printed report it appears that in *April* 1823 an insurance was effected upon the life of a lady, who at the end of 1822 had suffered from a pulmonary attack, and was attended by a surgeon. In *March* 1823 a medical practitioner who had known her for some years, but did not attend her during that illness, was sent for to examine her with a view to effecting the insurance in question; and he certified that she was in good health. In 1824 she died of a pulmonary disease. I left it to the jury generally to say whether any misrepresentation had been made; and the jury having found a verdict for the plaintiff, the Court of Common Pleas granted a new trial, on the ground that the jury ought to have been called upon to say whether it was material for the defendants to have been made acquainted with the illness of the lady in 1822. In the present case, the insurance was upon the life of a foreigner. It appeared that a previous insurance had been effected with an office that had an agent abroad. That office was requested to make a further insurance, and being unwilling to do so, the secretary handed over to the defendant the certificate received from their foreign agent. If that had distinctly disclosed the fact now in question, I am not prepared to say that the defendant would have had any ground of complaint; but the state of the duke's faculties is not distinctly stated in that certificate. Then it is said that the party is not bound to do more than answer the questions proposed, unless he can be charged with some fraudulent concealment. Admitting this not to fall within any of the specific questions, which is not by

(*a*) 4 *Bing*. 60.

any

1828.

LINDENAU against DESBOROUGH.

any means clear, still the general question put by the office requires information of every fact which any reasonable man would think material. It certainly seems to me that the circumstances proved as to the state of the Duke of *Saxe Gotha's* mental faculties were material; and, upon the authority of the cases of *Morrison* v. *Muspratt* and *Bufe* v. *Turner*, I think I should not have done wrong in leaving the case to the jury in the manner proposed at the trial.

BAYLEY J. I think that in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured; and that the proper question is, Whether any particular circumstance was in fact material? and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to shew that the party neglecting to give the information thought it material. But if it be held that all material facts must be disclosed, it will be the interest of the assured to make a full and fair disclosure of all the information within

1828.

LINDENAU against DESBOROUGH.

facts within their knowledge. In cases of life insurance certain specific questions are proposed as to points affecting in general all mankind. But there may be also circumstances affecting particular individuals which are not likely to be known to the assurers, and which had they been known would no doubt have been made the subject of specific enquiries. The general question appears to have been proposed in order to meet such cases, and I think the question on such a policy is not whether a certain individual thought a particular fact material, but whether it was in truth material, and of that the jury are by law constituted the judges. I therefore think the proposed direction would have been right, and that the nonsuit ought not to be disturbed.

Rule refused.

The KING *against* The Justices of LANCASHIRE. (*a*)

By the statute 4 *G.* 4. *c.* 95. *s.* 87. a right of appeal is given in certain cases, if the party gives notice within six days after the cause of complaint arises. Two justices having made an order upon the surveyors of the roads in a township to perform a certain part of the statute duty on a turnpike road running through the township, and to pay to the surveyor of that road a certain part of the money received as a composition for statute duty: Held, that the cause of complaint did not arise until a copy of the order in writing had been served, and that notice of appeal given within six days from that time was valid.

A RULE nisi had been obtained for a mandamus to the justices of *Lancashire*, commanding them to enter continuances, and hear an appeal against an order of two justices, whereby they appointed the inhabitants of the township of *Mosley* to perform a certain part of their statute work upon a certain turnpike road within that township, and that a certain portion of the money

(*a*) This case was heard and determined at the sittings in banc. after last term.

1828.

The King against The Justices of Lancashire.

received by the surveyors of the highways of that township as a composition for statute work, should be paid to the trustees of the turnpike road. It appeared by the affidavits that a list of persons liable to do statute work or compound for it within the township of *Mosley*, had been obtained by the surveyor of the turnpike road, and by him laid before two justices, in pursuance of the 4 *G.* 4. *c.* 95. *s.* 80. (*a*); that notice of the meeting was given

(*a*) By *s.* 80. of that statute it is enacted, "That the surveyor of the highways for every parish, &c. shall, on an order in writing made by the justices, on an application to them by the trustees or commissioners of the turnpike road, and delivered to such surveyor, or left at his last or usual place of abode, bring and deliver, within ten days afterwards, to the turnpike surveyor, lists, in writing, of the names of the several persons who, within such parish, &c., are by law liable to do statute work, or to the payment of money in lieu of or as a composition for such statute work, distinguishing the nature of the work to be done, and also the amount of the respective sums to be paid; and the turnpike surveyor having received such lists shall, within fourteen days afterwards, give a notice to the surveyor or surveyors of the highways of the time, when such lists will be laid before the justices, in order to apportion the said statute-duty, and at the time appointed by such notice, the lists shall be laid before the justices by the turnpike surveyor, in the presence of the surveyor of the highways (if he shall attend), and the said justices shall order and direct the surveyor or surveyors of such parishes, &c. respectively to pay over to the trustees or commissioners such proportion of the composition money for statute work, as they, the justices, shall think proper, and at such times

1828.

PATTISON *against* JONES.

slanderous matter, come within the scope of a privileged communication. But in such a case it will be a question for the jury, whether the defendant has acted bonâ fide, intending honestly to discharge a duty; or whether he has acted maliciously, intending to do an injury to the servant? In forming their judgment, the jury in this case were bound to take into their consideration the fact of the defendant's having voluntarily put himself into motion, and thereby in effect having, by the first letter, desired Mr. *Mornay* to put questions to him. These questions were put, and gave occasion to the second letter. The question for the jury to consider was, whether the defendant acted honestly and bonâ fide in making the representation contained in that letter? The jury had that question submitted to their consideration, and they were of opinion that the communication was not made bonâ fide, but that it was made with the intention to injure the plaintiff; and if it was made with that intention, it was not a privileged communication.

LITTLEDALE J. It seems to me that the letter, taken by itself, is a libel; but if it was a privileged communication, it was not necessary for the defendant to plead a justification, he might make that a defence on the general issue, and give evidence to satisfy the jury, that under the circumstances of the case it was a bonâ fide communication. That question was properly submitted to their consideration, and they have come to a conclusion that it was not made bonâ fide, and that the defendant was actuated by malice. I perhaps should not have come to the same conclusion; but I think the verdict ought not to be disturbed. Upon the question, whether a master who has written a libel in giving the character

1828.

The King against The Justices of Lancashire.

road was stopped up was too late. And in *Rex* v. *The Justices of Staffordshire* (*b*), it was held that the appeal should be to the next sessions after the making of the order, without reference to the time of giving notice of the order.

Coltman contrà. The case of *Rex* v. *The Justices of Staffordshire* proceeded upon the peculiar wording of the statute 13 *G.* 3. *c.* 78. which limited the appeal to the next sessions "after the order made." Here the notice of appeal is to be given "within six days after the cause of complaint shall arise." Now there could be no cause of complaint until the order was served, for until then no proceeding could be taken upon it. *Rex* v. *The Justices of Devon* (*a*) is very like this; there an appeal was given in similar terms; a distress warrant was issued, under which the parties' goods were seized; and it was held, that the cause of complaint was the seizure of the goods, not the granting of the warrant. Besides, in the present case, the appellant was bound to state the matter of his appeal, which he could not do until he had been served with a copy of the order.

[redacted]

1828.

The KING *against* The Justices of LANCASHIRE.

liable to statute duty is first to be obtained, a time is fixed for a meeting, and then the surveyor of the township is to have notice to attend. At the meeting the list is to be laid before the justices in the presence of the surveyor, "if he shall attend," but he is not bound to attend. Then the justices may make an order for the performance of statute duty, &c. But they are not bound to order that every man liable to the performance of statute duty shall do it on the turnpike road. They may order certain persons to do it, and from the nature of the thing that order must be in writing, as it would be impossible for the surveyor to keep it in his mind. In addition to this, the justices have power to order the composition money to be paid over at any "time or times." Here, although the proportion to be paid was verbally fixed, nothing was said as to the time of payment; and, therefore, the order was not complete; nor could it be complete until served upon the party to be bound by it. Parties are often present in this Court when rules are pronounced, but they are not bound to take notice of them until they are served. The appeal clause in this act plainly contemplates that the order and direction shall be communicated to the party, for he is to give notice of the ground and matter of his appeal, which he could not otherwise do. Again, the statute does not make it imperative on the surveyor of the township roads to attend before the magistrates; if he does not, of course the order must be served; and it is very desirable to have one uniform course of practice, whether the surveyor does or does not attend. Upon these grounds it appears to me that the notice of appeal being given within six days after the order in writing was

1828.

The KING *against* The Justices of LANCASHIRE.

served, was in good time; and that the rule for a mandamus must be absolute.

HOLROYD and LITTLEDALE Js. concurred.

Rule absolute.

Thursday, November 13th.

CROWDER and Another *against* P. LONG, Gent., one, &c.

A fieri facias issued against the goods of *A*. The goods were seized by the bailiff. The execution creditor authorised the bailiff to quit possession, the debtor consenting that he might return at any time and sell the goods. The bailiff accordingly gave up possession, and at the end of some months returned, and notice of sale was given. Be-

ASSUMPSIT for money had and received. Plea, general issue. At the trial before Lord *Tenterden* C. J., at the *London* sittings after last term, the following appeared to be the facts of the case: In 1825 the plaintiffs were sheriffs of *London*. The defendant was an attorney, and in *November* in that year, one *Rowley* was indebted to him in a large sum. *Rowley* also had a creditor of the name of *Rounds*, and having been pressed for payment, consulted the defendant *Long* professionally on the subject. The defendant advised *Rowley* to execute to him, the defendant, a warrant of attorney to confess judgment; and, at the defendant's suggestion, one *Jackson*, an attorney, was

1828.

CROWDER against LONG.

of fi. fa. issued against the goods of *Rowley*, returnable on *Monday* next after fifteen days of *St. Martin*. The writ was delivered to one *Denham*, an officer of the plaintiffs, and he by virtue of that writ seized the goods of *Rowley*. On the 26th of *November* 1825, *Jackson* directed *Denham*, on payment of the sheriff's poundage and officer's fees, to discharge the goods of *Rowley* taken in execution, and leave the warrant in the hands of one *Wood*. *Wood* was a servant of *Rowley*. *Rowley* signed a consent in writing that the plaintiffs and their officer might hold possession of his goods, and that they might continue in such possession or re-enter after the writ was returnable, and that they might sell on the premises, and that he would pay all expences attending the sale. On the 26th of *November* the execution was withdrawn, and on the 13th of *December Rowley* paid the sheriff's poundage to *Denham*. In *Hilary* term, 1826, *Long*, the defendant, ruled the plaintiffs to return the writ, and they returned that the goods remained in their hands unsold for want of buyers. In *May* 1826 *Long* directed the officer to proceed to a sale of the goods, and on the 26th of that month notice of the intended sale was published, and on the 27th *Rowley*'s goods were sold. In that month another fi. fa., at the suit of one *T. Wade*, was issued against the goods of *Rowley*, and delivered to the plaintiffs to be executed. In *July*, after the sale of the goods, and whilst the proceeds remained in the hands of the plaintiffs, *Wade* gave notice to them not to pay over the proceeds of the sale to the defendant *Long*. The plaintiffs then requested *Long* to indemnify them, which he refused to do. In *November* 1826, the plaintiffs paid over to the defendant 200*l.*, being the proceeds of the sale, and returned nulla bona to the fi. fa. issued at the

1828.

CROWDER against LONG.

suit of *Wade*. The latter brought an action against the plaintiffs for a false return, and recovered against them a verdict for 200*l.*; and they paid *Wade* the damages and 95*l.* for costs. The present action was brought by the plaintiffs to recover from the defendant the 200*l.* which they had paid him as the proceeds of the goods, and 95*l.*, the costs incurred in the action brought against them by *Wade*. It was objected that the plaintiffs were not entitled to recover, because they must have paid the money to the defendant with a full knowledge of all the facts. First, it was clear that *Denham* was acquainted with the fact of the execution having been withdrawn, and it could not be doubted that he had communicated that fact to the plaintiffs, his employers. But, secondly, assuming that he had not done so, still in point of law, the plaintiffs must be taken to have known every thing that their officer knew; for the act of the officer is the act of the sheriff, and the knowledge of the officer that of the sheriff. The fact, therefore, of the execution having been withdrawn with the assent of the defendant, must be taken to have been known to the plaintiffs at the time when they made the payment to the defendant. Lord *Tenterden* C. J. told the jury that

with the fact of the execution having been withdrawn by the authority of the defendant. *Denham* undoubtedly knew that fact, and, generally speaking, the sheriffs are liable for all acts done by the officer by their authority, but not for acts done without their authority at the request of an execution creditor. He directed the jury to find for the defendant, if they thought that the sheriffs knew every thing the officer knew; but if not, for the plaintiffs. The jury having found for the plaintiffs, damages 186*l.*,

Joshua Evans now moved for a new trial. Assuming that the present action is the action of the sheriffs' officer, it is quite clear that he cannot recover back this money. It was his duty to have continued in possession, and he ought to have known that that was his duty. At all events, he knew all the facts of the case, and having paid the money with full knowledge of those facts, he cannot recover it back, *Brisbane* v. *Dacres* (*a*), *Andrew* v. *Hancock* (*b*), *Bramston* v. *Robins* (*c*), *Milnes* v. *Duncan* (*d*), *Skyring* v. *Greenwood* (*e*). Secondly, supposing this to be the action of the sheriffs, and not that of their officer, they cannot recover. It is an established rule that for all civil purposes the act of the bailiff is the act of the sheriff, *Woodgate* v. *Knatchbull* (*f*), *Pechell* v. *Layton* (*g*), *Tyte* v. *Glode* (*h*), *Parrott* v. *Mumford* (*i*), *Sturmy* v. *Smith* (*k*). So if upon a fi. fa. against *A.* a bailiff takes the goods of *B.*, trespass lies against the sheriff, *Ackworth* v. *Kempe* (*l*); and

(*a*) 5 *Taunt.* 143.
(*b*) 1 *Brod. & B.* 37.
(*c*) 4 *Bing.* 11.
(*d*) 6 *B. & C.* 677.
(*e*) 4 *B. & C.* 281.
(*f*) 2 *T. R.* 151.
(*g*) 2 *T. R.* 712.
(*h*) 7 *T. R.* 267.
(*i*) 2 *Esp.* 585.
(*k*) 11 *East*, 25.
(*l*) *Doug.* 40.

in

1828.

Cashman against Lone.

in *Saunderson* v. *Baker* (*a*), *Blackstone* J. says, "The law looks upon the sheriff and his officer as one person." So the sheriff is liable if his officer does not arrest a person against whom a writ has issued, *North* v. *Miles*(*b*). So an averment that *G.* and *R.* became bail at the request of the sheriff, is satisfied by proving that they became bail at the request of the bailiff. [*Bayley* J. If the execution creditor authorize the bailiff to deviate from his duty, and the sheriff be thereby damnified, may not the execution creditor be liable for the damage so occasioned by that breach of duty so induced by his act? Is not such act of the bailiff, as between the sheriff and the execution creditor, to be considered the act of the latter? It is done by his authority.] The general rule is, that the act of the bailiff is the act of the sheriff. The latter, therefore, must be taken to have been cognizant of the misconduct of the officer, and to have paid this money to the defendant with full knowledge of all the facts of the case.

Lord TENTERDEN C. J. I should be sorry to break in upon the general rule which applies in actions brought against a sheriff for breach of his duty in executing pro-

[redacted]

1828.

CROWDER against LONG.

proper if the execution of the present defendant had been in force at the time when the writ issued at the suit of *Wade*; but the defendant's execution was not then in force, because the officer had improperly quitted possession, and upon that ground *Wade* recovered from the present plaintiffs the value of the goods seized by the sheriffs. The question which arose incidentally in that case was, whether *Denham* had been guilty of misconduct; and in the result it was found that he had. The question now is very different. It appeared that the act of the officer was done without the knowledge of the sheriffs, but with the full knowledge and assent of the defendant; and that the sheriffs were compelled in consequence of that misconduct of the officer so authorized by the defendant, to pay to a third person the value of those very goods, which they had already paid to the defendant. Now it is quite clear that the sheriffs are entitled to recover the money so paid to the defendant, unless at the time when such payment was made they were acquainted with the fact of the misconduct of their officer. I think that as between these parties, the act of the officer is not to be considered the act of the sheriffs, so as to make the latter by *implication* parties to the misconduct of the officer; but that it was incumbent upon the defendant to shew that the sheriffs had actual knowledge at the time when they made that payment.

BAYLEY J. According to the general rule, the act of the officer is, in point of law, the act of the sheriff. But the present case is an exception to that rule. If the officer be guilty of misconduct, and that misconduct is produced by the act of the execution creditor, it is not competent

1828.

Crowder against Long.

competent to the latter to say that the act of the officer done in breach of his duty to the sheriff, and induced by the execution creditor, is the act of the sheriff. The facts of this case are, an execution issued at the suit of the present defendant against *Rowley*. That execution, for any thing the sheriff knew, was an honest execution. It was the duty of the officer, as between himself and the sheriff, to seize the goods of the debtor, and sell them. But the present defendant (the execution creditor) desired the officer not to sell, but to go out of possession, and he did go out of possession. That was misconduct in the sheriffs' officer, but who induced that misconduct? The present defendant. The sheriff was not privy to it. That being so, it would be contrary to all principle to permit the defendant to say that that was the act of the sheriff. In *May* the officer re-enters, and is directed by the defendant to sell the goods. But in that month another execution issued at the suit of *Wade*, and he insisted that the goods of the debtor were his. The sheriff returned nulla bona to *Wade*'s writ, and he brought an action against the sheriff for a false return, to try the validity of *Long*'s execution. The question in that action was, whether *Long* or *Wade* was entitled to

[redacted]

have received. If it could be shewn to be the action of the officer, then, perhaps, the rule in pari conditione melior est conditio possidentis would prevail. But here the money was paid by the sheriff to the defendant.

LITTLEDALE J. I am not disposed to break in upon the rule that the act of the officer must, in point of law, be considered the act of the sheriff. But we shall not break in upon that rule by our decision in this case. The rule is, that the act of the officer, in execution of the authority received from the sheriff, is the act of the sheriff. But here the act done by the officer, was an act done, not in pursuance, but in direct contravention of that authority; for the officer had authority from the sheriff to seize and sell the goods of the debtor, but he seized, and then gave up possession, and the sheriff was thereby compelled to pay the value of the goods seized to *Wade*. The sheriff, at the time when he paid the value of the goods to the defendant, had no knowledge of the misconduct of his officer. That misconduct was induced by the act of the defendant. As between the sheriffs and the defendant, therefore, the act of the officer by which the sheriff has been damnified, was the act of the defendant, and not of the sheriff.

Rule refused.

See *Cook* v. *Palmer*, 6 *B. & C.* 739.

1828.

Monday, November 17th.

DOE on the demise of LIDGBIRD *against* LAWSON and Another.

A fine was levied by *A.* in *Hilary* term, 1821. *A.* and *B.* claimed to be heir at law of *C.* There being several actions depending to try, whether *A.* or *B.* was heir at law, it was agreed that the rent should be paid into a banker's, to abide the event of one of those causes. The cause was decided in favour of *A.* in 1823, and the rent paid into the banker's was then paid over to him. It included half a year's rent due from the tenant on the 25th of

EJECTMENT for lands in the county of *Kent*. At the trial before Lord *Tenterden* C. J., at the Summer assizes for the county of *Kent*, 1828, the following appeared to be the facts of the case:—The lessor of the plaintiff claimed the premises in question as heir at law of *Francis Lidgbird*, who died in *October* 1820, seised of the premises in question; the defendant, as devisee of *Henry Wilding*; and the question upon the merits was, whether the lessor of the plaintiff, or *Henry Wilding*, was the heir at law of *Francis Lidgbird*. The lessor of the plaintiff having proved his pedigree, and thereby established that he was the heir at law of *F. Lidgbird*, the defendant set up a fine levied by *Henry Wilding* in *Hilary* term 1821, with proclamations made in that and the three following terms; and in order to shew that *Henry Wilding*, the party levying the fine, was at that time seised of an estate of freehold in the premises in

1828.

DOE dem. LIDGBIRD against LAWSON.

a banker's to abide the event of that cause. In pursuance of that agreement, the half year's rent, due at *Lady-day* 1821, was, in *March* 1822, paid into a banker's, and it was agreed that it should remain there until after the trial of the cause, and then be paid to *Wilding*, the defendant, in replevin, in case a verdict should be found for him, or otherwise to the plaintiff. That cause was tried at the Summer assizes, 1823, and a verdict was found for the defendant, and the rent was then paid over to the executors of *Wilding*, he having died in the meantime. It was insisted, on the part of the defendants, that as the rent which became due on the 25th *March* 1821 had been paid to the executors of *Wilding*, he must be taken to have been seised of a freehold by relation, from the time of the death of *F. Lidgbird* in *October* 1820, and, consequently, that he was so seised in *Hilary* term 1821, when the fine was levied, and that an entry ought, therefore, to have been made to avoid it. The counsel on the other side relied upon Lord *Townsend* v. *Ashe* (*a*) as an authority to shew that a fine levied before any receipt of rent, by a person who had taken possession by wrong, has no effect, and that perception of the rent, after the levying of the fine, though for a period antecedent to the fine, was no evidence of a seisin, even at the time when that rent became due. Lord *Tenterden* C. J. was of opinion, that *Wilding*, not having actually received any rent at the time when the fine was levied, had no seisin. A verdict having been found for the lessor of the plaintiff,

Sir *James Scarlett*, on a former day in the term, moved for a new trial. It is clear that if *Wilding*

(*a*) 3 *Atk.* 336. more fully reported in *Cruise, Dig.* tit. 35. c. 5. s. 34. vol. v. 121.

had

1828.

Doe dem. Lisgard against Lawson.

had received the rent of the premises in question at the time when he levied the fine, he would have had a sufficient seisin. Lord *Townsend* v. *Ashe* (*a*). Now he ultimately did receive the half-year's rent which accrued due at *Lady-day* 1821. *F. Lidgbird* died in *October* 1820. The rent received at *Lady-day* 1821 was in respect of the preceding half-year. The payment of that rent to him was an acknowledgment by the tenant of a right in him accruing at the death of *F. Lidgbird*. The perception of that rent by him was evidence of a seisin in him commencing in *October* 1820 when *F. Lidgbird* died. If that be so, *Wilding* was seised in *Hilary* term 1821 when the fine was levied. In *Doe on the demise of Osborn* v. *Spencer* (*b*) Lord *Ellenborough* intimated, that the receipt of rent due after a fine levied for a period antecedent to such fine, was primâ facie evidence of the party's possession of the premises by his tenant during the period for which the rent was received.

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court. The case of Lord *Townsend* v. *Ashe* was cited at the trial to shew that the fine, under the

[redacted]

1828.

Doe dem. Lidgbird against Lawson.

receiving the rents till 1740. It was contended, that as no profits had been received till after the fine levied, there was no disseisin, and, consequently, that the fine did not operate. To this it was answered, that the first payment, though not received till *February*, was due at *Christmas*, and that the receipt should relate to the time when the money was due. Upon this point Lord *Hardwicke* said: "The answer given on the plaintiffs' part was, that no rent was received by the defendants till after the fines levied; and this I think a full answer, for, till then, there could be no disseisin. The profits were in the hands of the company at the time of the fines levied; and they must be considered as received by them for the party who had right, and not for a wrongdoer. Nor can the subsequent payment have relation to the receipt before that time: for fictions and relations in law are good to support right, but not to work wrong." Now that case is an authority to shew that the payment in 1823, of the rent which became due at *Lady-day* 1821, was no evidence of a seisin in *Wilding*, even at the time when the rent became due. Here it was insisted that it was evidence of a seisin in *Wilding* in *Hilary* term 1821, before it became due. Upon the authority of that case we think that *Wilding* was not seised when he levied the fine; and, consequently, that the fine did not operate, and was no bar to the present action.

Rule refused.

1828.

Thursday, November 13th.

A bill was drawn by *A.* upon *B.* for the accommodation of *C.*, who indorsed it for value to *D.* Neither *A.* nor *C.* had any effects in the hands of *B.* The bill was dishonoured by *B.*: Held, that the drawer was entitled to notice.

NORTON *against* PICKERING.

THIS was an action by the plaintiff, as the indorsee, against the defendant as the drawer of the following bill of exchange: "Two months after date pay to myself, or order, 50*l.*, value received." It was accepted by *Sheppard* and Co., indorsed by the defendant to *Naylor* and *Ellis*, and by them to the plaintiff. At the trial before *Bayley* J., at the Summer assizes for the county of *York*, 1828, it appeared that *Naylor* and *Ellis*, being indebted to the plaintiff for goods sold by him, requested the defendant to draw and indorse the bill, and *Sheppard* and Co. to accept the same; and *Naylor* and *Ellis* then indorsed the bill to the plaintiff. Neither *Naylor* and *Ellis* nor the defendant had any effects in the hands of *Sheppard* and Co. during the time the bill was running. No notice of the dishonor of the bill was given. The learned Judge was of opinion that the defendant was entitled to notice of dishonor, and nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict.

those decisions, if possible. It does not appear by the report of *Cory* v. *Scott*, whether the plaintiff was privy to the mode of concocting the bill. Here it appears that the bill was taken by the plaintiff for goods in the usual course of business, and that he did not know of nor was privy to the making of the bill. The defendant, by putting his name to the bill as drawer, subjected himself to all the liabilities of drawer. One of those liabilities is, that, not having effects in the hands of the acceptor, he is liable to pay the bill, although he has no notice of dishonor. It will alter the character in which he signed the bill if it be held that he is entitled to notice. The Court cannot look dehors the instrument itself, unless the person seeking to avail himself of it can be shewn to have assented to some qualification of his liability.

Lord TENTERDEN C. J. I think the case of *Cory* v. *Scott* (*a*) was properly decided, and that it must govern the present case. It may be questionable whether it might not have been more conducive to the interests of commerce to have decided that the holder of a bill is not at liberty to give evidence of any circumstance to excuse the want of notice. Here the defendant does not seek to avail himself of circumstances dehors the bill. He being drawer of the bill, by the law of merchants, was entitled to notice of dishonor. The plaintiff does attempt to get rid of the law merchant, for he says the acceptor had no effects of the drawer in his hands. I think the defendant was entitled to notice of dishonor, and that the nonsuit was right.

Rule refused.

(*a*) 5 *B.* & *A.* 619.

1828.

Friday, November 14th.

HOLDERNESS and Another, Assignees of FOXTON, *against* SHACKELS.

A., B., and *C.,* together with others, were part-owners of a ship engaged in the whale fishery. The usual mode of managing the cargo was, that on the arrival of the vessel at her homeward port, the whalebone was taken into the possession of *B.*, and sold by him, and the proceeds were applied towards the discharge of the expenses of the ship. The blubber was deposited in a warehouse rented of *C.* by the owners of the ship, and the oil produced

TROVER for twenty tons of whale-oil, of the value of 1000*l.* The first count of the declaration alleged the property to belong to the bankrupt before his bankruptcy; second count stated the property to be in the plaintiffs, as his assignees. Plea, general issue. At the trial before *Bayley* J., at the last Spring assizes for the county of *York*, a verdict was found for the plaintiffs, damages 220*l.* 10*s.*, subject to the opinion of this Court on the following case:

The plaintiffs were the assignees of *Foxton*, under a commission dated the 2d of *May* 1826, and their title to sue in that character was fully proved. The bankrupt *Foxton*, jointly with one *Locking* and the defendant, and some other persons, was part-owner of the ship *Jane*, a vessel belonging to *Hull*, engaged in the whale fishery. *Locking* was the ship's husband. The usual mode of managing the cargo was as follows: On the

1828.

HOLDERNESS *against* SHACKELS.

bone was taken into the possession of *Locking*, and sold by him for the part-discharge of the expenses of the ship. The blubber was landed and deposited in a yard belonging to the defendant, in which were several warehouses, each of which was appropriated to a particular ship. One of these was rented from the defendant by the owners of the ship *Jane*, and appropriated exclusively to that ship. The blubber was boiled in a boiling-house in the yard by one *Gilchrist*, employed at the defendant's yard as foreman, and paid by the owners of the several ships; and for this a certain price per ton was charged by the defendant. The blubber being then reduced into the shape of oil, was put into casks: each part-owner's share was then weighed out, and placed separately in the warehouse rented by the owners of the ship; and the particular casks containing his oil were marked with his initials in chalk. *Gilchrist* kept the key of the warehouse, and lived in the yard. After each division, the practice was for him to deliver to the separate orders of each owner the oil belonging to them, unless previously to the delivery he received a notification from the ship's husband, that the part-owner's share of the disbursements had not been paid to him. In that case, he used to detain the oil till the ship's husband's demand had been satisfied. It was optional for the owner to have his oil in his own or the ship's casks. In the latter case, he was to send away the oil in the ship's casks, he returning the casks or paying for them when wanted. In *June* 1825, the ship *Jane* arrived with a cargo, and the above being the usual course, was followed on that occasion. The share weighed and set apart for the bankrupt *Foxton*, before his bankruptcy,

1828.

HOLDERNESS against SHACKELL.

was twenty-nine tons and thirty-six gallons. Part of this was stowed in the ship's casks. All the casks were set apart in the ship's warehouse, and had the bankrupt's initials upon them in chalk. *Foxton*, before his bankruptcy, gave various delivery-orders to *Gilchrist*, under which twenty tons of this oil had been delivered. The remainder, being nine tons thirty-six gallons, being all in the ship's casks, remained in the ship's warehouse at the time of the bankruptcy. In *January* 1826, *Gilchrist* had orders from *Locking*, as the ship's husband, not to deliver to *Foxton* the remaining oil, as his share of the disbursements of the ship was not paid. *Locking*, the ship's husband, became bankrupt in *April* 1826. *Foxton* stopped payment in *January* 1826. There were two accounts between *Locking* and *Foxton*, one being the ship's account, and the other a general account-current. In the ship's account it appeared, that after charging every disbursement on account of the vessel, as if they had actually been paid by him, (except the rent of the warehouse and the charges of boiling, which remained due to the defendant,) and after giving credit for the sale of the whalebone, and a small portion of oil, there remained due from the bankrupt *Foxton*, at the

1828.

HOLDERNESS *against* SHACKELS.

Foxton had credit therein for two of his own acceptances for 300*l.* and 450*l.*, which were afterwards dishonoured. On the 8th of *January* last, the plaintiffs, as assignees of *Foxton*, formally demanded possession of the nine tons thirty-six gallons of oil from the defendant, offering to pay to him a sum which exceeded what he demanded in respect of rent and charges for boiling the blubber. This sum he had himself, by an account in his own handwriting, fixed at 59*l.* 6*s.* In answer to this demand, the defendant stated that he wished the matter to stand over for a few days. Accordingly, on the 31st of *January*, the plaintiff *Holderness* called again upon the defendant, and tendered to him the sum due in respect of his demand for rent and boiling, but the defendant then absolutely refused to receive the monies or give up the oil. He, however, stated, that the oil was in his possession and under his control, and that he could give it up if he thought proper; but he added, that the owners of the *Jane* had instructed him not to do so. The value of the oil so detained was 220*l.* 10*s.*

E. H. Alderson for the plaintiffs. The defendants, who were part-owners of the ship, had clearly no lien on the oil, even if it had not been separated from the residue. Secondly, if they had any lien in point of law, still, in fact, there was nothing due from *Foxton* at the time of his bankruptcy to the other part-owners. Thirdly, assuming that there was such a debt, and that the part-owners had a lien, still the separation of this oil from the residue, and the putting of *Foxton*'s name on the casks in which it was contained, was an appropriation,

1828.

HOLDERNESS against SHACKELL.

and vested the property in him. As to the first point, *Smith* v. *De Silva* (*a*) is an autnority to shew that the plaintiffs are entitled to recover. There the outfit had been conducted by *De Silva*, who was appointed to manage the concern as ship's husband in pursuance of an agreement made by three others at the time of their becoming owners of the ship; and *De Silva* settled the accounts with them, and took from one of them, who afterwards became bankrupt, promissory notes, payable at a future day, for a part of his share of the expense: it was held, that the assignees of the bankrupt were entitled to receive the full share of the profits, and that the ship's husband (who had after his appointment acquired an interest in the ship by purchasing a part of the share of one of the other part-owners) was only entitled to a dividend under the commission for the amount of the notes. In that case no distinction was made between the bankrupt's share in the ship and his share in the profits of the adventure. In *Doddington* v. *Hallett* (*b*), several persons had entered into a contract with one *Hall*, empowering him to build and fit out a ship at their joint expense, for the service of the *East India* Company, and he having died insolvent without

1828.

HOLDERNESS *against* SHACKELS.

Young (*a*), and ex parte *Harrison* (*b*), by Lord *Eldon*, who decided, that part-owners of a ship, being tenants in common, and not joint tenants, no lien attached on the share of one, a bankrupt, who had also been managing owner, for outfit, freight, &c. due to the others. Supposing that there was a lien, and that the other part-owners had a right to retain, here there was nothing due from the bankrupt to the other part-owners. The ship's husband took the whole upon himself. The debt, if any, was due from *Foxton* to *Locking*, and not to the other part-owners. The debt due to *Locking* could not give the defendant any lien. Assuming that there was a debt, and that the other part-owners had a right to retain for it that right was destroyed, because here the bankrupt had actual possession of the oil. The part belonging to him had been separated from the residue, and put into casks, which had his initials marked on them. It is true that the case states it to have been the custom not to deliver if the ship's husband was not satisfied; but here a delivery of part had taken place, and all the casks were marked with the name of the bankrupt, who was charged with warehouse-rent. *Hurry* v. *Mangles* (*c*), shews that, under such circumstances, there was an executed delivery of the whole. Besides, where a buyer removes from a warehouse a part of an entire quantity of goods sold at a fixed and entire price, it even puts an end to the right of stoppage in transitu, *Stoveld* v. *Hughes* (*d*), *Hammond* v. *Anderson* (*e*).

Parke contrà was stopped by the Court.

(*a*) 2 *Ves. & B.* 242.
(*b*) 2 *Rose, B. C.* 76.
(*c*) 1 *Campb.* 452.
(*d*) 14 *East*, 308.
(*e*) 1 *Bos. & Pul. N. R.* 69.

Lord

1828.

HOLDERNESS *against* SHACKELS.

Lord TENTERDEN C. J. This is not the case of a claim of lien on the share of the ship, but a claim by persons, being part-owners of a ship, engaged together in an adventure; and the subject-matter, in respect of which this action is brought, is part of the proceeds of that adventure, viz., part of the oil which had been obtained on a fishing voyage. Now, it is clearly established as a general principle of law, that if one partner becomes a bankrupt, his assignees can obtain no share of the partnership effects, until they first satisfy all that is due from him to the partnership. The case of *Smith* v. *De Silva* (*a*) is a very entangled case, and the facts stated in the report are not very clear or perspicuous. It appears that *De Silva* had originally made advances, not as part-owner of the ship, nor even as partner in the adventure, but as a person appointed by all the part-owners to manage the adventure for them, rather as their agent than as their partner. He afterwards acquired an interest by purchasing a part of the ship, and so became a partner in the adventure; but he was not an original partner. *Smith* v. *De Silva* may, therefore, have been properly decided, without breaking in on the general principle to which I have adverted.

had been incurred before the bankruptcy. The next point turns on the separation of that portion of the oil which belonged to the bankrupt, upon which great reliance has been placed on the part of the plaintiff. It has been said, that there has been an appropriation of that quantity of oil to the bankrupt, and that the property thereby vested in him, and cannot be devested. But in order to decide whether the property vested in him or not, it is necessary to look at the practice of the part-owners of this ship in antecedent voyages, in order that we may know what was the effect of marking particular casks with the initials of any of the part-owners. The case states, that when the blubber had been reduced into oil, each part-owner's share was weighed out, and placed separately in the warehouse rented by the owners of the ship, and the particular casks containing his oil were marked with his initials in chalk; that *Gilchrist* kept the key of the warehouse and lived in the yard; that after each division, the practice was for him (*Gilchrist*) to deliver to the separate orders of such owners the oil belonging to them, unless, previously to the delivery, he received a notification from the ship's husband that the part-owner's share of the disbursements had not been paid to him. In that case he used to detain the oil till the ship's husband's demand had been satisfied. That having been the practice between the parties, it appears to me that the separation of the oil of a particular part-owner from the residue, and putting his initials upon the casks, was not an absolute appropriation of the cask and its contents to that part-owner, but only a qualified appropriation enabling him to take the goods, unless the ship's husband afterwards prevented him by giving notice to the warehouseman.

1828.

HOLDERNESS against SHACKELS.

houseman. The particular circumstance of separating the oil in question from the residue, and putting on the cask which contained it the initials of *Foxton*, connected with the previous usage between the parties, appears to me to amount in this case not to an absolute but to a qualified appropriation only. The property in the oil was thereby vested, but subject to be devested (as in point of fact it was) by the intervention of *Locking*. It seems to me that the justice and law of the case are with the defendant, and that there ought to be a judgment of nonsuit.

BAYLEY J. Where there is a joint adventure which produces certain goods, the proper course is, first to deduct all the expenses which have been incurred in order to obtain those goods, and then to divide the residue among the shareholders, in proportion to the shares to which each is entitled respectively. In this case the joint adventurers obtained a quantity of oil in bulk. No partner, or representative of a partner, had a right to his aliquot part of that oil until he had paid his share of the expense of procuring it. That will be the case, whether the shareholder has become bankrupt

1828.

HOLDERNESS *against* SHACKELS.

it seems to me, the justice and the law of the case is, that his share of the expense should be paid out of the twenty-nine tons, and that, until he has paid his share of the expense, he cannot claim that quantity. It has been said, that there has in this case been a delivery, and that, in consequence of that delivery, the rights of *Foxton*, and of his assignees, are different from what they otherwise would have been. But it seems to me that there has not been a perfect delivery. It would have been perfect if the other part-owners had been dispossessed of the oil. That has not been done. The property still remained in the warehouse, and was the joint property of all. A part only has been removed. The removal of that part does not vary the right as to the residue. It is clear that the assignees cannot recover the twenty-nine tons before they pay *Foxton*'s share of the expense. The other part-owners might say, there are twenty-nine tons allotted to you; you may take possession of all to which you will be entitled, but you must first pay your share of the expense: nine tons will be sufficient for that purpose; you may, therefore, take away twenty tons. The right of the other part-owners is not varied by their having allowed the bankrupt to take away twenty tons. That being so, the plaintiffs are not entitled to recover. It has been urged, that there has, in this case, been a change of possession, by reason of *Locking*'s having debited the bankrupt in account with a portion of the rent. But that portion of the rent must have been paid by the bankrupt before he took away the oil in specie; or it might have been deducted out of his share of the produce, if he compelled the other shareholders to sell, in order to pay his share of the expense. The usage being for the part-

owners

1828.

HOLDERNESS *against* SHACKELS.

owners to detain the oil, until each part-owner's share of the expense has been paid, it seems to me, that the fact of debiting the party with warehouse-rent can have no effect. I think, therefore, that the plaintiffs have not made out their right to the residue of the oil; and, consequently, that there ought to be a nonsuit.

Judgment for the defendants (*a*).

(*a*) *Littledale* was in the bail court.

Friday, November 14th.

SIGOURNEY *against* LLOYD and Others.

A bill of exchange drawn in *America* on a house in *London*, payable to order, was indorsed by the payee generally to *A.*, and by him in these words: "Pay to *B.* or his order for my use." *B.* applied to his bankers to discount the bill, and they, without making any enquiry, did so.

ASSUMPSIT for money had and received. Plea, general issue. The plaintiff was a merchant residing at *Boston*, in the United States of *America*. The defendants were bankers in *London*, carrying on business under the firm of Messrs. *Jones*, *Lloyd*, and Co. Before the trial the parties agreed that the plaintiff should take a verdict by consent for 3164*l.* 11*s.* 8*d.*, subject to the following case, with liberty for either party to turn it into a special verdict. This was accordingly done with the approbation of Lord *Tenterden* C. J., before whom the cause came on for trial: —

1828.

SIGOURNEY against LLOYD.

"2971*l.* due 28th *November.*

"*Rio de Janeiro*, 12th *July* 1825.

"For 3164*l.* 11*s.* 8*d.* 1258.

"At sixty days sight pay this first of exchange, second and third not paid, to the order of Messrs. *Hendricks*, *Wierss*, and Co. three thousand one hundred and sixty-four pounds, eleven shillings, and eight-pence, value of the same, which place to account, as per advice from

"*March*, *Sealy*, *Walker*, and Co."

This bill was indorsed by the payees to *A. Attwood.*

"*Rio de Janeiro*, the 12th *July* 1825.

"For 3164*l.* 11*s.* 8*d.*

"At sixty days sight pay this third of exchange, first and second not paid, to the order of Messrs. *Hendricks*, *Weirss*, and Co., three thousand one hundred and sixty-four pounds, eleven shillings, and eight-pence, value of the same, which place to account, as per advice from

"*March*, *Sealy*, *Walker*, and Co."

This was indorsed by the payees to *A. Attwood*, by *Attwood* to the plaintiff, by the latter in the following words: "Pay to *Samuel Williams*, Esq., of *London*, *or his order*, *for my use*;" and by *S. Williams* to *Jones* and Co.

Attwood sent the first of the set to the correspondent of the plaintiff, Mr. *Samuel Williams* of *London*, who was an *American* agent and factor for merchants and planters, carrying on such business to a very great extent, inclosed in the following letter: "Sir, I herewith have the honour to enclose you the first of exchange for 3164*l.* 11*s.* 8*d.* sterling, at sixty days sight, on Messrs. *March*, *Sealy*, and Co., in *London*, in favour of myself, it being the proceeds of a cargo of flour in brig *Swiftsure*, belonging

1828.

SIGOURNEY against LLOYD.

belonging to *Henry Sigourney*, Esq., *Boston*, *America*, which you will please to present for acceptance, and keep at the disposal of the second or third." But he did not indorse the bill. *Williams* received the letter and bill on the 26th *September* 1825, and procured the acceptance of the bill in due course. The third of the set was remitted to the plaintiff; and he having indorsed it as aforesaid, "Pay to Mr. *Samuel Williams*, or order, for my use," remitted it to *Williams* in the following letter of the 17th *September* 1825: "Captain *Amaziah Attwood*, of my brig *Swiftsure*, arrived here yesterday, *Rio Janeiro*, whence he sailed about the *July*. He informs me that he left a letter directed to you, to be forwarded to you by the next *English* mail, containing the first of *March*, *Sealy*, *Walker*, and Co.'s draft on *March*, *Sealy*, and Co., *London*, dated 12th of *July*, at sixty days sight, for 3164*l.* 11*s.* 8*d.* sterling, in favor of Messrs. *Hendricks*, *Weirss*, and Co., and by them indorsed to said *A. Attwood*. He thinks he did not indorse the draft; and if received, it can only be accepted. Enclosed you have third bill of the set indorsed to me by Captain *Attwood*, and to yourself by me. I presume that if the other should have been previously

1828.

SIGOURNEY *against* LLOYD.

on the 25th of the same month, upon which a commission, dated the 27th of the same month, was issued, and he was declared a bankrupt immediately afterwards. At the time *Williams* received the bill in question, as well as at the time of his bankruptcy, the balance of account was in favour of the plaintiff to the amount of upwards of 3000*l.*, exclusive of the before-stated bill. On the morning of the 22d of *October*, when the discount hereinafter mentioned was made, the balance in favour of *Williams* with the defendants was 8784*l.* 10*s.* 10*d.* About 11 o'clock on that day *Williams* indorsed the bill in question, with others, amounting in the whole to 7081*l.* 17*s.* 9*d.*, to the defendants, who were his bankers, and in the habit of discounting for him very largely, and the said bills were bonâ fide discounted for him, and credit given to him for the amount, less the discount; and subsequently, viz. at the clearing house about 5 o'clock in the evening of that day, the defendant paid *Williams*'s acceptances due that day to the number of thirty-two, and three drafts, amounting to 10;683*l.* 18*s.* 1*d.* The bill in question was honored at maturity, and the amount received by the defendants on the 28th *November* 1825.

F. Pollock for the plaintiff. The bill belonged to the plaintiff, and he is entitled to recover its amount from the defendants. The indorsement was special, so as to prevent the indorsee from transferring any interest in the bill beyond the particular purpose or the particular individual mentioned in the indorsement. The earliest case where such a special indorsement is mentioned, is *Snee* v. *Prescott* (*a*). There Lord *Hardwicke*

(*a*) 1 *Atk.* 247.

 says,

1828.

Shoberry against Lloyd.

says, "Promissory notes and bills of exchange are frequently indorsed in this manner, *Pray, pay the money to my use*, in order to prevent their being filled up with such an indorsement as passes the interest." In *Edie* v. *The East India Company* (a), *Wilmot* J., speaking of an indorser, says, "To be sure he may give a mere naked authority to a person to receive it for him: he may write upon it, 'Pray, pay the money to my servant, for my use;' or use such expressions as necessarily import that he does not mean to indorse it *over*, but is only authorizing a particular person to receive it for him and for his *own use*. In such case it would be clear that no valuable consideration had been paid him. But, at least, that intention must *appear upon the face of the indorsement*." It appears, therefore, from these two authorities, that an indorsement in the form used in the present case will prevent the indorsee from passing the interest in the bill by a subsequent indorsement. The general indorsement of a bill makes it the legal property of the indorsee, and gives him the jus disponendi; but an indorsement for the use of another, is notice that the property in the bill is in that other, and that the holder is an agent for him, and cannot transfer the bill. [He

general rule is, that an indorsement transfers to the indorsee all the rights of the indorser, and, among others, the right of transferring the interest in the bill by indorsement, *More* v. *Manning* (*a*), *Acheson* v. *Fountain* (*b*), *Edie* v. *East India Company* (*c*). In the latter case, *Wilmot* J. even intimated a doubt whether there could be a restrictive indorsement. But, conceding that there may, the question is, whether the indorsement in this case contains clear negative words restraining the negotiability of the bill? The words must be construed most strongly against the plaintiff, the party using them. First, the bill is indorsed payable to order. Primâ facie, therefore, it was transferrable. The legal title was in *Williams*, though, as between the plaintiff and him, he might be bound to hold the bill for the plaintiff's use; and if *Williams* had the legal title, he might transfer his interest in the bill by indorsement. The meaning of such an indorsement was considered in *Evans* v. *Cramlington* (*d*). There the bill was payable "to *Price* or order, for *the use of Calvert*." *Price* indorsed it to *Evans*; after which an extent issued against *Calvert*, and the money due upon it was seized to the use of the King. These facts appearing upon the pleadings, two points were made upon demurrer; the one, whether *Calvert* had such an interest in the money as might be extended; and the other, whether *Price* had power to indorse the bill, or whether he had only a bare authority to receive the money for the use of *Calvert*; and the Court of King's Bench, and afterwards the Exchequer Chamber, held that *Calvert* had not such an interest as could be

(*a*) *Com.* 311. (*b*) 1 *Str.* 557. (*c*) 2 *Burr.* 1216.
(*d*) *Carth.* 5. 2 *Vent.* 307. *Skinn.* 264. 1 *Show.* 4.

1828.

Broomhead against Lloyd.

extended, and that *Price* had power to indorse the bill, and judgment was given for the plaintiff. In the case, as reported in *Shower*, p. 4., Lord *Holt* says, "This is a bill which is assignable by *Price*, and when *Price* assigned it he received the money, and that receipt was for the use of *Calvert*; and there *Calvert* hath his action; but we can take notice of none but *Price*; and at this rate the credit of bills of exchange will be spoiled." [*Bayley* J. The question was not raised there whether *Price* indorsed contrary to his duty to *Calvert*.] If *Calvert*'s consent had been necessary, that must have been stated in the pleadings to have been given; but there is no such averment. The pleadings are set out in 2 *Ventris* (*a*). That case, therefore, is an authority to shew that *Williams* had authority to transfer the interest in the bill in this case. The words "to my use" may be construed as a direction from the plaintiff to *Williams*, his agent, to apply the bill, or the proceeds of it, to his, the plaintiff's, use. The other construction makes the indorsement restrictive. But the intention is not clear, and it ought to be so, in order to restrain the negotiability of the bill. If the first construction be adopted, the defendants clearly were not bound to see to

cording to the argument on the other side, every subsequent indorsee would be a trustee for the plaintiff. That would be very inconvenient. [*Bayley* J. We are not bound to decide that all the subsequent indorsees will be trustees for the plaintiff.] The argument is equally good if it be confined to the case of the first indorsee. The question turns entirely on the intention of the indorser. In *Evans* v. *Cramlington* (*a*), Lord *Holt* says, that when *Price* assigned the bill, and received the money, he became trustee for *Calvert*. If that be so, then *Williams*, by indorsing for value to *Lloyd*, became trustee for the plaintiffs. That was before the bill became due. He could not make the defendants trustees for the plaintiffs. The reasonable construction of the indorsement is, that it was a direction by the principal to his selected agent to apply the proceeds to his use. If there were any fraud or other suspicious circumstances, the case might have been different. *Treuttel* v. *Barandon* (*b*) proceeded on that ground. [*Bayley* J. Here the defendants were parties to the misapplication of the money.] They applied the money generally according to the directions of *Williams*; they could not know in what mode *Williams* was to apply the money to the use of the plaintiff. This was a bonâ fide discount in the way of trade to *Williams* himself. The defendants were not trustees for the plaintiff.

Lord TENTERDEN C. J. I am of opinion that in this case the plaintiff is entitled to recover. It appears from the report of the case of *Snee* v. *Prescot* (*c*) that in 1743 an indorsement in this form was not unusual; and it

(*a*) 1 *Show.* 4. (*b*) 8 *Taunt.* 100. (*c*) 1 *Atk.* 247.

1828.

Sigourney against Lloyd.

appears to have been the opinion of Lord *Hardwicke* in that case, and also to have been the opinion of Mr. Justice *Wilmot*, in the case of *Edie* v. *The East India Company*(a), that such an indorsement will have the effect of preventing a subsequent transfer of the bill for the benefit of any other than the person for whose use it is expressed to have been made by the indorsement. The case of *Ancher and Others* v. *The Bank of England* (b) is an authority to the same effect. The indorsement was not precisely in the same form as in the present case; but the effect of it is the same. The indorsement there was, "The within must be credited to Captain *Moreton L. Dahl*, value in account." An indorsement purporting to have been made by *Dahl* was afterwards forged, and the Bank of *England* discounted the bill. The acceptors did not pay it; before it became due they had failed, and one *Fulgberg* paid it for the honor of *Ancher* and Co. the plaintiffs; and upon the ground that the indorsement had restrained the negotiability of the bill, they brought an action for money had and received against the Bank. Lord *Mansfield* directed a nonsuit; but upon a rule to shew cause why there should not be a new trial, and cause shewn, Lord *Mansfield*, *Willes*

which they did. It has been said that the indorsement "Pay to *Williams* for my use," is a mere direction to *Williams* to apply the money produced by the bill to *Sigourney*'s use; but the words taken in that sense would be useless; for whether the words be on the face of the indorsement or not, as soon as *Williams* received the proceeds of the bill, he must necessarily apply them to *Sigourney*'s use, and place them to his credit in the account between them. So that those words will have no effect whatever, unless they have that of restraining the negotiability of the bill, or at least of making the first indorsee (if he takes the bill with those words on it, as *Williams* did in this case) a trustee for the original indorser. The case of *Evans* v. *Cramlington*, when duly considered, does not seem to me to be sufficient to countervail the authorities to which I have already adverted. The bill in that case was drawn by *Cramlington* upon one *Ryder*, payable to *T. Price* or his order, for 500*l.*, for the use of *F. Calvert*. *Ryder* accepted, but did not pay the bill. *Price* indorsed it to *Evans* for value. The latter brought an action against *Cramlington* the drawer; he pleaded that *Calvert* (who was named in the bill as the cestuique use) was an officer of the excise, and indebted to the king in such a sum, and that upon an exchequer process at the suit of the king this 500*l.* was extended in his hands. To this plea there was a demurrer. It appears, therefore, that *Cramlington* in answer to the claim of *Evans*, the indorsee, set up what is sometimes denominated the jus tertii; and the only question which it was necessary for the Court to determine was, whether the bill being in trust only for the use of *Calvert*, was liable to be seized under the extent against him? The Court was of

1828.

SEGOURNEY against LLOYD.

opinion that it was not. The proposition of *Cramlington*, that the jus tertii intervened, failed entirely, and it became unnecessary to decide any other point. That case, therefore, as it seems to me, is not of sufficient weight to countervail the opinions delivered in *Snee* v. *Prescot* (a), *Edie* v. *The East India Company* (b), and *Ancher* v. *The Bank of England* (c). The use of indorsements of this kind is not small, nor are they, as it seems to me, inconsistent with the interests and convenience of commerce. Such an indorsement will not prevent the indorsee from receiving the money from the acceptor when the bill becomes due. If he pay it to his principal all will be well, but the indorsee must look to him for the application of it. It will have the effect of preventing a failing man from disposing of the bill before it becomes due, and from pledging it to relieve himself from his own debts at the expense of his correspondent. I cannot see that the interests of commerce will be prejudiced by our holding that such an indorsement is restrictive. On the contrary, I think that the interests of commerce will thereby be advanced. It is said, that it cannot be expected that bankers or others when requested to discount such bills as this, should look into

1828.

SIGOURNEY *against* LLOYD.

question is, whether the words "*for my use*" have or have not any effect with reference to the bill itself? The person who remits a bill, may give private directions to his correspondent in the letter in which the bill is inclosed, and if he means the directions to be private, they will be confined to the letter. But when he introduces the words "*to my use*" on the bill itself, he notifies to the world that he, the party indorsing, has not given to the indorsee a general unlimited authority to apply it to his own purposes, but only to apply it to the use of him the indorser. It has been suggested, that the most convenient construction to put on the words will be, to hold that the indorser meant thereby to direct *Williams* to apply the money to his, the indorser's use, but not to put the indorsee on his guard. My opinion is, that that is the most convenient construction which will most effectually protect the party who appears by the form of the indorsement used by him to have thought that he required protection. It is said, why introduce the words "or order?" The purposes of the indorser may, perhaps, have required that the bill should be indorsed. But before any person could honestly take that bill and advance money on it, he ought, seeing the words "for my use" on the bill, to have satisfied himself, from the correspondence and the state of the accounts between *Sigourney* and *Williams*, whether the latter was indorsing it for the benefit of *Sigourney* or for himself. And if such a person advances money upon a bill so indorsed without making such enquiry, he advances it at his peril. Now, in this instance, the defendants advanced money on this bill without making any enquiry, and applied the whole of that money to the use of *Williams*. The bill was discounted on the

22d

1828.

SHOUBRIDGE against LLOYD.

22d of *October*, the day after it was received. At that time *Williams* had more than 3000*l.* in the hands of the defendants. They discounted this and other bills to the amount of 7000*l.*, and in the course of the day all the money produced by this and other bills, to the amount of 10,000*l.*, was applied to the use of *Williams*, so that in the afternoon of that day they had in their hands 182*l.* only.

As to the case of *Evans* v. *Cramlington*, it is sufficient to say that that case came before the Court on demurrer, and that there was no question whether there had been any misapplication of the money which had been received by means of the bill. In this case there has been a misapplication of the money by the defendants. That is a sufficient distinction between this case and that of *Evans* v. *Cramlington*. For these reasons I am of opinion, that in this case the plaintiff, who made the special indorsement, thereby effectually protected himself, and is entitled to the judgment of the Court.

Postea to the plaintiff (*a*).

(*a*) *Littledale* J. was in the bail court.

1828.

JAY, Gent., one, &c., *against* COAKS.

Friday, November 14th.

Where a judge's order for taxing an attorney's bill is not obtained until after he has commenced an action for the amount, the defendant is not entitled to the costs of taxation, although more than one-sixth is taken off by the Master.

THE plaintiff, in *December* 1827, delivered his bill of costs for business done for the defendant. The latter made no application for a Judge's order to tax the bill within a month after the delivery, but after the plaintiff had commenced an action to recover the amount of his bill, the defendant, on the 14th of *February* 1828, obtained a Judge's order to tax the bill; on the 9th of *June* the bill was taxed, and upon such taxation, more than a sixth having been taken off, the defendant obtained a rule to refer it to the Master to allow him the costs of taxation.

Parke, in *Trinity* term, obtained a rule nisi to discharge that rule, upon the ground that a party was only entitled to the costs of taxation when a sixth of the bill was taken off upon taxation, made by virtue of the statute 2 *G.* 2. *c.* 23. *s.* 23., and that under that statute the application to tax the bill ought to have been made within a month after its delivery.

Kelly, in *Trinity* term last, shewed cause, and contended that every taxation of an attorney's bill made before or after action brought, was within the meaning of the statute.

Parke contrà. Before the statute 2 *G.* 2. *c.* 23. *s.* 23., an attorney might have sued his client immediately after he had delivered his bill. The statute 2 *G.* 2. *c.* 23.

s. 23.

1828.

JAY against COAKS.

s. 23. prevents an attorney from bringing any action to recover the amount of his bill until the expiration of a month after he shall have delivered it; and upon application of the party sought to be charged, and upon his submission to pay the sum that upon taxation shall appear to be due, the bill may be referred to taxation, although no action be depending, and if the bill taxed be less by a sixth part than the bill delivered, the attorney is to pay the costs of the taxation. The taxation, therefore, contemplated by the statute, is a taxation made upon the application of the client before action brought. If the case had been tried, and the bill had been reduced one-sixth by the verdict of a jury, the defendant would not have been entitled to any costs; or if a verdict had been taken, subject to a reference to the Master, and one-sixth had been taken off, the costs of taxation would not have been allowed. The same point came before the Court of C. P. in *Benton* v. *Bullard* (a). The prothonotary in that case had refused to allow the costs of taxation, on the ground that the plaintiff had commenced his action on his bill before the defendant obtained any order to tax it, and said that he had uniformly pursued that course. The Court said,

1828.

JAY *against* COAKS.

a sixth part of the bill had been taken off. The rule which has been obtained for discharging the rule for allowing these costs must, therefore, be made absolute.

Rule absolute.

HANDLEY *against* LEVY.

Monday, November 17th.

Where in an action commenced in the Palace Court, and afterwards removed into K. B., the plaintiff recovers less than the sum for which he held the defendant to bail, the Court of K. B. has no power to allow the defendant his costs under the statute 43 *G.* 3. *c.* 46. *s.* 8.

THIS action, which had been commenced in the Palace Court, was removed by the defendant into this Court. The defendant had been arrested and held to bail for 19*l.* The plaintiff recovered only 2*l.* A rule nisi had been obtained to tax the defendant his costs under the 43 *G.* 3. *c.* 46. *s.* 8.

Thesiger shewed cause. The eighth section enacts, that where a defendant has been arrested for any sum, if it be made appear to the satisfaction *of the court in which the action is brought* that the plaintiff hath not reasonable or probable cause for arresting and holding the defendant to bail to such amount, the defendant shall be entitled to costs of suit. Here the action having been brought in the Palace Court, this Court has no jurisdiction, *Costello* v. *Corlett* (*a*).

Lord TENTERDEN C. J. The action having been brought in the Palace Court, we have no power by the statute to interfere. The rule must be discharged.

Rule discharged.

(*a*) 4 *Bingh.* 474.

1828.

Thursday, November 27th.

An affidavit of debt, stating that defendant was indebted to the plaintiff as liquidator (duly appointed by the law of *France*) of an estate is irregular, unless it shew that by the law of *France* a liquidator is entitled to sue.

TENON *against* MARS. (*a*)

IN this case the plaintiff and defendant were subjects of the king of *France*. The affidavit of debt was by *T. A. Tenon*, liquidator (legally appointed by the law of *France*) of the estate of *J. Vernarell* and *T. A. Tenon*, lately carrying on business as booksellers at *Paris* under the firm *Vernarell* and *Tenon*, and stated that the defendant was indebted to *T. A. Tenon* as liquidator of that estate, by virtue of promissory notes drawn in *France* by the defendant. A rule nisi had been obtained by *Denman* for delivering up the bail-bond to be cancelled, on the ground that it did not appear by the affidavit of debt, that the plaintiff as liquidator, by the law of *France*, was entitled to sue.

The Court, after hearing *Manning* against the rule, were of opinion that it ought to have been shewn that, by the law of *France*, a liquidator was entitled to sue, and made the rule absolute.

[redacted]

1828.

The KING *against* The Justices of KENT.

Friday, November 28th.

Semble, That it is unnecessary to enter and respite an appeal at the next sessions, where the order of removal is served so late as to render it impossible to try the appeal at those sessions.

AN order for the removal of a pauper from the parish of *Lenham*, in *Kent*, to the parish of *Pluckley*, in the same county, was made on the 7th of *April*, and served on the 8th. The sessions were holden on the 15th of *April*, at *Maidstone*. By the practice of the sessions, eight clear days' notice of the intention to try an appeal is required. The appeal was not entered at the *April* sessions, but the parish officers of *Pluckley* gave eight clear days' notice of their intention to try the appeal at the *July* sessions. At the time when the order of removal was served, the parish officers of *Pluckley* said they should appeal; the parish officers of *Lenham* observed, that nothing could be done at the then next (*April*) sessions, as there would not be eight clear days before those sessions. The court of quarter sessions refused to hear the appeal, on the ground that it ought to have been entered and respited at the sessions which were holden on the 15th of *April*. A rule nisi having been granted for a mandamus to the justices of the county of *Kent* to enter continuances and hear the appeal,

Bolland now shewed cause. The appellant ought to have entered and respited his appeal at the *April* sessions, *Rex* v. *The Justices of Herefordshire* (*a*).

(*a*) 3 *T. R.* 504.

Lord

1828.

The KING against The Justices of KENT.

Lord TENTERDEN C. J. We think it reasonable, under the circumstances of this case, that the parish officers of *Pluckley* should have an opportunity of trying their appeal. They may probably have been misled by the observation made by the parish officers of *Lenham*, that they could do nothing at the then next (*April*) sessions, as there were not eight clear days before those sessions. Independently of that, it appears to me to have been wholly unnecessary to enter and adjourn the appeal at the first sessions, when they could not, according to the practice of those sessions, then try it.

Rule absolute (*a*).

(*a*) The following case was decided in *Hilary* term 1829.

The KING *against* The Justices of DEVON.

An order of removal was served too late to enable the parish to which the pauper was removed to try an appeal at the next sessions; but it might have been entered and respited at those sessions: Held, that that

An order of removal from the parish of *Upottery* to *Pittminster* was served on the 8th of *April*. The sessions were held at *Exeter* on *Tuesday* the 15th day of *April*. The distance between *Pittminster* and *Upottery* is eight miles, and between *Pittminster* and *Exeter* thirty miles. By the practice of the sessions eight clear days' notice of the intention of the appellant to try his appeal is required. But an appeal may be entered and respited without any notice. The appeal was not entered at the *Easter* sessions. But eight days' notice of the intention to try the appeal at the *July* sessions was given by the appellant parish. The court of quarter sessions refused to hear the appeal, on the ground that it ought to have been entered at the *April* sessions. A rule nisi for a mandamus to the

1828.

The KING *against* The Justices of KENT.

Coleridge and *Estcourt* contrà. The rule for a mandamus must be made absolute, unless it be necessary to enter an appeal in all cases, although the order of removal is served so late as to render it impracticable to try the appeal at the sessions next after the making of the order. The entering of the appeal at those sessions must, under such circumstances, be useless, and can only occasion unnecessary expense. In *Rex* v. *The Justices of Essex* (1 *B.* & *A.* 210.), the order of removal was served on the appellant parish on *Saturday;* the sessions were holden on the following *Tuesday;* the appellant parish was thirty-seven miles from the place where the sessions were holden. There was no appeal to those sessions, and the justices refused to receive the appeal at the second sessions. This Court granted a mandamus. It was urged against that application, that the appellant ought to have entered and respited the appeal; but Lord *Ellenborough* said, "That would only be incurring a useless expense without conferring any benefit on either party, and was therefore quite unnecessary." *Rex* v. *The Justices of Southampton, Trinity* term, 57 *G.* 3., is also in point.

Cur. adv. vult.

Lord TENTERDEN C. J. This was a rule for a mandamus to the justices of *Devon* to enter continuances and hear an appeal. The order of removal was served on the 8th of *April;* the sessions were holden on the 15th at *Exeter.* By the practice at those sessions, eight clear days' notice of the intention to try an appeal was required. It is clear, therefore, that in this case the appellant could not have tried his appeal at the *April* sessions; but it was contended that he ought to have entered it at those sessions, and adjourned it to the next. The entry for the mere purpose of adjournment is an useless act, and only occasions unnecessary expense. I think, therefore, that he was not bound to enter it at those sessions. One inconvenience only can follow from our holding, that it is not necessary, under such circumstances, to enter the appeal at the first sessions, viz. where the removal is made within eight days of the sessions, so that the parish to which the pauper is removed cannot try their appeal at those sessions, the removing parish may not know of the intention of the other parish to appeal until eight days before the second sessions. If that should prove to be an inconvenience, the court of quarter sessions may remedy it by requiring, under such circumstances, a longer notice. We think that the court of quarter sessions ought to have heard the appeal, and that the rule for a mandamus must be made absolute.

Rule absolute (*a*).

(*a*) The KING *against* The Justices of SOUTHAMPTON.

The order, which was for the removal of a pauper from the parish of *Ropley* to the parish of *Bentworth*, was dated the 2d of *January*. It was signed by the magistrates at *Arlesford*, which place was distant from *Ropley* four

1828.

The KING against The Justices of KENT.

four miles, and from *Bentworth* eight, and *Bentworth* was distant from *Ropley* five miles. The order was not served until the 7th of *January*. The sessions were holden at *Winchester* on *Monday* the 14th of *January*. The distance between *Winchester* and *Bentworth* was fifteen miles. By the practice at the *Hampshire* sessions, notice of prosecuting appeals against orders of removal was required to be given by the appellants eight days, at least, before the sessions. The parish-officers of *Bentworth*, therefore, could not try their appeal at the *January* sessions. They applied to the Court for leave to enter the appeal at an adjournment of those sessions holden on the 15th of *March*, but that was refused. Due notice of appeal was given for the *April* sessions, which were holden on the 15th of that month; but the justices of those sessions refused to hear the appeal, on the ground that it had not been entered at the preceding sessions. In *Easter* term, 57 *G.* 3., a rule nisi was granted for a mandamus, commanding the justices to enter continuances and hear the appeal, and it was made absolute in *Trinity* term.

Friday, November 28th.

MICHLAM *against* BATE.

The defendant is not entitled to costs of a judgment of non pros. obtained by reason of the plaintiff having omitted to enter

ISSUE was joined in this case in *Michaelmas* term upon demurrer to a plea in abatement. The plaintiff omitted to enter the issue upon record. Judgment of non pros. was signed by the defendant for not entering the issue. The defendant's attornies applied for costs

1828.

The KING *against* The Justices of KENT.

Coleridge and *Estcourt* contrà. The rule for a mandamus must be made absolute, unless it be necessary to enter an appeal in all cases, although the order of removal is served so late as to render it impracticable to try the appeal at the sessions next after the making of the order. The entering of the appeal at those sessions must, under such circumstances, be useless, and can only occasion unnecessary expense. In *Rex* v. *The Justices of Essex* (1 *B.* & *A.* 210.), the order of removal was served on the appellant parish on *Saturday;* the sessions were holden on the following *Tuesday;* the appellant parish was thirty-seven miles from the place where the sessions were holden. There was no appeal to those sessions, and the justices refused to receive the appeal at the second sessions. This Court granted a mandamus. It was urged against that application, that the appellant ought to have entered and respited the appeal; but Lord *Ellenborough* said, "That would only be incurring a useless expense without conferring any benefit on either party, and was therefore quite unnecessary." *Rex* v. *The Justices of Southampton, Trinity* term, 57 *G.* 3., is also in point.

Cur. adv. vult.

Lord TENTERDEN C. J. This was a rule for a mandamus to the justices of *Devon* to enter continuances and hear an appeal. The order of removal was served on the 8th of *April;* the sessions were holden on the 15th at *Exeter.* By the practice at those sessions, eight clear days' notice of the intention to try an appeal was required. It is clear, therefore, that in this case the appellant could not have tried his appeal at the *April* sessions; but it was contended that he ought to have entered it at those sessions, and adjourned it to the next. The entry for the mere purpose of adjournment is an useless act, and only occasions unnecessary expense. I think, therefore, that he was not bound to enter it at those sessions. One inconvenience only can follow from our holding, that it is not necessary, under such circumstances, to enter the appeal at the first sessions, viz. where the removal is made within eight days of the sessions, so that the parish to which the pauper is removed cannot try their appeal at those sessions, the removing parish may not know of the intention of the other parish to appeal until eight days before the second sessions. If that should prove to be an inconvenience, the court of quarter sessions may remedy it by requiring, under such circumstances, a longer notice. We think that the court of quarter sessions ought to have heard the appeal, and that the rule for a mandamus must be made absolute.

Rule absolute (*a*).

(*a*) The KING *against* The Justices of SOUTHAMPTON.

The order, which was for the removal of a pauper from the parish of *Ropley* to the parish of *Bentworth*, was dated the 2d of *January*. It was signed by the magistrates at *Arlesford*, which place was distant from *Ropley* four

1828.

MICHLAM against BATE.

not have been liable to pay the costs, if the Court, after argument, had given judgment against him, we think he ought not to be subject to costs by reason of his having omitted to enter the issue, and thereby rendered expense unnecessary. The rule must, therefore, be made absolute.

Rule absolute.

Friday, November 28th.

In the Matter of JAMES NUNN.

By stat. 6 G. 4. c. 108. s. 3. if any vessel therein described shall be found on the high seas, within 100 leagues of any part of the coasts of the United Kingdom, or shall be discovered to have been within the said distance, having on board the goods

PLATT on a former day in this term obtained a rule to shew cause why a writ of habeas corpus should not issue, directed to the gaoler or keeper of the convict gaol at *Springfield*, in the county of *Essex*, or his deputy, commanding him to bring up the body of *James Nunn*. It appeared by the affidavits in support of the rule, that *Nunn* had been convicted before two justices of the borough of *Harwich*, in the county of *Essex*, upon the information of *E. J. Jennings*, an officer of customs, of having within six months then last past, to wit, on

therein specified, the goods and the vessel shall be forfeited. By s. 49 every person who

1828.

In the Matter of NUNN.

the 18th of *September* 1828, he *Nunn* being a subject of his Majesty, and liable to be stopped, arrested, and detained for the offence thereinafter mentioned, *been found on the high seas on board a certain vessel liable to forfeiture* under the provisions of stat. 6 *G.* 4. *c.* 108.; for that the said vessel not being square-rigged, and belonging to his Majesty's subjects, on the day and year aforesaid, was found on the high seas aforesaid, elsewhere than in any part of the *British* or *Irish Channel*, within 100 leagues of a certain part of the coast of the county of *Essex*, having on board divers, to wit, 4300 pounds weight of tobacco, &c. contrary to the form of the statute in that case made and provided; and the said *James Nunn* having been found on board the said vessel at the time of her becoming and being so subject and liable to forfeiture; and the said *James Nunn* having been on the day and year last aforesaid, for the offence aforesaid, stopped, arrested, and detained by *W. P.*, he *W. P.* being an officer of customs, and by him taken and brought into a certain place on land in the United Kingdom, to wit, into the borough of *Harwich*, in the county of *Essex*, the said justices had adjudged that the said *James Nunn* had forfeited for his said offence 100*l.*; that sum not having been paid, the justices required *W. P.* and *W. B.* to take and convey *Nunn* to the said convict gaol at *Springfield*, in the county of *Essex*, and to deliver him into the custody of the gaoler of that gaol, and required the said gaoler to take *Nunn* into his custody, and safely keep him until he should pay the said 100*l.* The affidavits then stated, that *Nunn* at the time when he was arrested and detained, as in the commitment was mentioned, was not found upon the high seas as charged in the

1828.

In the Matter of NUNN.

commitment, but was then on board a certain vessel called the *Mary* and *Eliza*, being the vessel referred to in the commitment, which vessel was then proceeding on her voyage, and sailing upon that part of the coast of *Suffolk* which lies next the bounds of the parish of *Walton*, in the county of *Suffolk*, but not at a greater distance than 300 yards from the land on the said coast, and in the river *Orwell*, commonly called the *Ipswich Water*; and the place where he was so stopped, arrested, and detained was opposite to the south-east side of the town of *Harwich*, in the county of *Essex*, where the river is about a mile wide; and that the said town of *Harwich* and part of the coast of *Essex* may be very distinctly seen from the said place, and also that part of the coast of *Suffolk* which is nearest to the said place; and that the civil and criminal jurisdiction of the borough of *Ipswich* extended from the town of *Ipswich* down the said river, below *Landguard Fort*; and that persons were tried at the sessions for the borough of *Ipswich*, for offences committed upon the said river, at least seven miles distant from the parochial limits of the said borough; and that the jurisdiction of the justices of the borough of *Ipswich* over the place therein-

1828.

In the Matter of NUNN.

he boarded her, and found *Nunn* on board her. The rule was obtained on the ground that the magistrates of *Harwich* had no jurisdiction to try the offence; first, because there was no evidence to shew that *Nunn* was on board the vessel on the high seas; and, secondly, assuming that that fact was made out, the magistrates of *Ipswich* or of the county of *Suffolk* had jurisdiction, and not the magistrates of the borough of *Harwich*.

The Solicitor-General and *Shepherd* now shewed cause. The information alleges that *Nunn* had been found on the high seas on board a vessel liable to forfeiture, and that the justices convicted him of the offence charged in the information. They have, therefore, adjudged that he was found on board the vessel on the high seas, and their judgment is equally conclusive as to that fact, as it is as to the fact that a quantity of tobacco was on board that vessel. But assuming that to be otherwise, it appears by the depositions that the custom-house officer, at a quarter past four in the morning, discovered a vessel coming into the harbour, and that when she had come into the harbour, he made for her, boarded her, and then found *Nunn* on board her. At the time when the vessel was first seen she was on the high seas. It is wholly immaterial where she was when she was seized. It is sufficient that she was found on the high seas. Then, as to the second point, it is clear that the justices of the borough of *Harwich*, by the 6 *G.* 4. *c.* 108. *s.* 74., had jurisdiction to try the offence; for that was the first place on land into which she was carried.

Platt contrà. *Nunn*, the prisoner, was taken and carried to a place which was within the local jurisdiction of the magistrates, either of the borough of

1828.

In the Matter of NUNN.

Ipswich or of the county of *Suffolk;* and *Kite* and *Lane's* case (*a*) shews that having been taken within one jurisdiction, he ought not to have been removed to another. Secondly, by the statute 6 *G.* 4. *c.* 108. *ss.* 3. 49. and 74. (*b*), it

(*a*) 1 *B.* & *C.* 101.

(*b*) By the statute 6 *G.* 4. *c.* 108. *s.* 3. it is enacted, that if any vessel or boat not being square rigged, belonging in the whole or in part to his Majesty's subjects, shall be found in any part of the *British* or *Irish* Channels, or elsewhere on the high seas, within one hundred leagues of any part of the coasts of the United Kingdom, or shall be discovered to have been within the said limits or distances, having on board, inter alia, tobacco, &c.; then and in such case the said tobacco, and also the vessel or boat, with all guns, &c. therein, shall be forfeited.

By *s.* 49. it is enacted, that every person, being a subject of his Majesty, who shall be found or discovered to have been on board any vessel or boat liable to forfeiture under that or any other act relating to the revenue of customs, for being found within four or eight leagues of the coast of the United Kingdom as aforesaid, or for being found or discovered to have been within any of the distances or places in that act mentioned, from or in the United Kingdom, or from or in the *Isle of Man*, having on board, or having had on board, or conveying or having conveyed in any manner such goods or other things as subject such vessel or boat to forfeiture, shall forfeit the sum of 100*l.*; and it shall be lawful for any officer of the army, navy, or marines, being duly authorized, and on full pay, or any officer of customs or excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, to stop, arrest, and detain every such person, and to carry and convey such person before two or more justices of the peace in the United Kingdom,

[redacted]

1828.

In the Matter of NUNN.

it is essential, in order to give the magistrates jurisdiction, that the offence should have been committed on the high seas. The justices of *Harwich*, therefore, had no jurisdiction to convict *Nunn*, unless they had some evidence to shew that he was on board the vessel on the high seas. There was no evidence to shew that he had committed any offence upon the high seas. The only evidence was, that he was on board the vessel at the time when, and the place where, she was seized; but that was a place within the jurisdiction of the magistrates of the borough of *Ipswich*. It is consistent with the facts sworn to before the magistrates, that *Nunn* may have come on board the vessel after she had left the high seas. There was no evidence to shew that he was in her but in the place where he was found. The magistrates, in the conviction, assume that he was upon the

---

&c. as any justice of the peace for the county within which such city, &c. is situated, shall have jurisdiction to hear and determine all cases of offences against such act so committed upon the high seas, any charter or act of parliament to the contrary notwithstanding. Provided always, that all offences against that or any other act relating to the revenue of customs committed in any city, borough, &c, shall be deemed and taken to have been committed in the county within which such city, &c. is situated, and as well any justices of the said city, &c. as any justices of any county in which such city, &c. is situated, shall have jurisdiction to hear and determine the same.

By *s.* 80. it is enacted, that it shall be lawful for any two or more justices of the peace before whom any person liable to be arrested and detained, and who shall have been arrested and detained for being found or discovered to have been on board any vessel or boat liable to forfeiture under that or any act relating to the revenue of customs, &c., shall be carried, on the confession of such person of such offence, or on proof thereof upon the oaths of one or more credible witnesses, to convict such person; and every such person so convicted shall immediately pay into the hands of such justices the penalty of 100*l.*, or in default thereof the said justices shall commit such person to any gaol or prison, there to remain until such penalty be paid.

high

1828.

In the Matter of Nunn.

high seas. They had no right to assume that fact, when there was no proof of it.

Lord Tenterden C. J. The objection taken to the conviction is twofold; that the prisoner was not found on board a vessel on the high seas; and that his offence, if any, was committed within the jurisdiction of the justices of *Suffolk* or *Ipswich*, and not those of *Harwich*. It has been said, that supposing the vessel to have been on the high seas, this man might have come on board her after she had left the high seas. If that were the fact, it was matter of defence to the information, because in that case the allegation of the prisoner having been found on the high seas would not have been made out in proof. We cannot, therefore, assume that to have been the fact. It is said, however, that if in truth it shall appear that the offence was not committed on the high seas, but within the body of a county, although that would have been a defence to the information, yet, as the fact of his being on the high seas is that which gives jurisdiction to the magistrates, we ought to enquire into it, notwithstanding the averment in the information that he was found upon the

1828.

In the Matter of NUNN.

vessel must have been upon the sea; and if the man was in the vessel upon the sea, he was guilty of the offence charged in the information. As to the other point, the seventy-fourth section enacts, "that if any offence shall be committed upon the high seas, such offence shall, for the purposes of prosecution, be deemed and taken to have been committed at the place on land in the United Kingdom, into which the person committing such offence shall be taken, brought, or carried." Now this person was taken, brought, and carried into *Harwich*. If, therefore, the offence was committed upon the high seas, which, for the reasons already given, I think it clearly was, if he was first taken into *Harwich*, the magistrates of that place had jurisdiction to try him, and the objection which has been taken, as to the want of jurisdiction in the convicting magistrates, falls to the ground. *Kite* and *Lane's* case is entirely different from the present. The information in that case alleged, that the party had been found on board a boat in the harbour of *Folkestone*, not that he had been found upon the high seas, or that any offence had been committed there.

BAYLEY J. By the third section of the 6 *G.* 4. *c.* 108., any ship discovered to have been at sea with tobacco on board, under the circumstances therein mentioned, is liable to forfeiture; and by section 80. "any person found on board such ship is liable to be convicted." But it is contended, that this person was not found to have been on board this ship on the high seas, but that he was upon the water within the limits of the county of *Suffolk*, or the borough of *Ipswich*; and then it is said, that the seventy-fourth section is to be read as

if

1828.

In the Matter of NUNN.

if the magistrates of the place in which the party is arrested and taken only had jurisdiction; but the words of that section give authority to those magistrates within whose jurisdiction the party shall be *taken, brought, or carried*. Therefore, if he was taken upon the water within the limits of a particular county, and was carried in the vessel to any other place not within the limits of that county, the magistrates of that place to which he was so carried had jurisdiction over the subject. In *Kite* and *Lane's* case the party was first carried to *Folkestone*, and afterwards taken from *Folkestone* to *Dover*.

LITTLEDALE J. In order to constitute an offence within this act of parliament two things must concur. First, the vessel must have been on the high seas, and next the party must have been on board the vessel on the high seas. Now in this case both these things concur. First, it appears by reasonable evidence that the vessel was found within the limits mentioned in the act of parliament, having tobacco on board, and that *Nunn* was on board the vessel while she was in that situation. It is said he might have been taken on board

1828.

In the Matter of NUNN.

to try it. The vessel in going up a river may pass through several jurisdictions; but the justices of the place on land into which the man is first taken, have jurisdiction to try him. That place, in this case, was *Harwich*.

PARKE J. I also think that the magistrates of *Harwich* had jurisdiction. The question turns on the construction of the seventy-fourth section. In order to give the magistrates jurisdiction, two things are necessary. First, that the offence shall have been committed on the high seas; and, secondly, that the convicting magistrates shall be magistrates of the place on land to which the person who has committed the offence is carried. First, there was abundant evidence for the magistrates to find, that the defendant was on board the vessel on the high seas. Secondly, though it may happen that in the course of taking the vessel from the place where the man was arrested (and the place where he was arrested is immaterial) he may have passed over a portion of land covered with water, which was within another jurisdiction, there is no doubt that *Harwich* was the first place on land to which he was taken, and that the magistrates who committed him were magistrates having jurisdiction at that place. That being so, they had jurisdiction over the offence. This rule must, therefore, be discharged.

Rule discharged.

1828.

PITT *against* NEW.

An affidavit of debt for money paid for the use and benefit of the defendant is irregular, if it omit to state that it was paid at his request.

A RULE nisi had been obtained for discharging the defendant out of the custody of the sheriff of *Gloucester* upon filing common bail, upon the ground that the affidavit of debt was defective. It stated that *John New* was indebted to deponent *Pitt* in the sum of 6400*l.* for money paid, laid out, and expended by deponent to and for the use and benefit of *John New*; but it did not allege it to have been paid at the request of *New*.

Campbell now shewed cause. In *Dumford* v. *Messiter* (*a*), it was undoubtedly decided, that an affidavit of debt for money lent, and for goods sold and delivered, and for work and labour, is irregular, if it omit to state "at the instance and request of defendant," although it state that it was "to and for his use and on his behalf;" but in *Bliss* v. *Atkins* (*b*), *Eyre* v. *Hulton* (*c*), and *Berry* v. *Fernandes* (*d*), the Court of Common Pleas

1828.

PITT *against* NEW.

having paid money to the use of another, does not (unless it has been paid at the request of that other) give him any cause of action against that other, because a man cannot, of his own will, pay another man's debt, and thereby convert himself into a creditor. It is perfectly consistent, therefore, with the facts stated in the affidavit, that the plaintiff may not be entitled to recover. The affidavit, consequently, is insufficient, and this rule must be made absolute.

Rule absolute.

The KING *against* The Inhabitants of LEW (*a*).

An assistant overseer, elected and appointed under the statute 59 *G.* 3. *c.* 12., at an annual salary of 10*l.*, will gain a settlement by serving such office for a year.

But the appointment in writing, under the hands and seals of the justices, to such an office, with an annual salary annexed to it, requires a stamp of 2*l.*

UPON appeal against an order of two justices, whereby *W. Purbrick*, his wife and children, were removed from the township of *Charlbury*, in the county of *Oxford*, to the hamlet of *Lew* in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:

W. Purbrick, the pauper, being settled in the hamlet of *Lew*, was, on the 16th day of *October* 1826, duly elected by the inhabitants of the township of *Charlbury*, in vestry assembled, to be an assistant overseer of the poor of the said township, in pursuance of the statute 59 *G.* 3. *c.* 12. *s.* 7. The vestry determined that the pauper should perform the duties and receive the salary mentioned in the warrant of appointment hereinafter set

(*a*) The Judges of this Court sat, as on former occasions, from *Monday* the 8th day of *December* to *Saturday* the 20th day of *December* inclusive; and from *Tuesday* the 13th day of *January* to *Thursday* the 22d day of *January* inclusive. During that period this and the following cases were argued and determined.

forth.

1828.

The KING *against* The Inhabitants of LEW.

forth. On the 18th of the same month he was appointed such assistant overseer by the following warrant under the hands and seals of two justices: "The township of *Charlbury*, in the county of *Oxford*, to wit. Whereas the inhabitants of the township of *Charlbury*, in the county of *Oxford*, in vestry assembled in the said township on the 17th day of *October* 1826, did nominate and elect *W. Purbrick*, of the township aforesaid, to be an assistant overseer of the poor of the said township, and did fix the yearly sum of 10*l.* as and for the yearly salary of the said *W. Purbrick*, for the execution of his said office. Now we, two of his Majesty's justices of the peace in and for the said township, and in pursuance of the statute in such case made and provided, do hereby appoint the said *W. Purbrick* to be an assistant overseer of the poor of the said township, and we do hereby authorise and empower him to execute and perform the said duties, and to receive the said salary so as aforesaid fixed by the said inhabitants in their said vestry." This warrant of appointment was not stamped. The pauper duly performed the duties of assistant overseer by virtue of the aforesaid appointment, for one whole year from the date thereof, and

such an office, whether the warrant of appointment, being in writing, required a stamp.

Cooper in support of the order of sessions. The statute 3 & 4 *W. & M. c.* 11. *s.* 6. enacts, "That any person who shall for himself, or on his own account, execute any public annual office or charge during one whole year, shall gain a settlement." An assistant overseer does not execute a public annual office or charge within the meaning of that statute. First, strictly speaking, he does not execute any office at all. An office must be derived mediately or immediately from the crown, or be created by act of parliament. The statute 59 *G.* 3. *c.* 12. *s.* 7. only enables the inhabitants to elect an assistant overseer if they think fit. The party so elected does not derive his employment from the act of parliament, but from the parishioners. [*Parke* J. It is called an office in the statute 59 *G.* 3. *c.* 12. *s.* 7.] Secondly, it is not an annual office, for the appointment may be revoked at any time within the year. Thirdly, the statute 3 & 4 *W. & M. c.* 11. *s.* 6. contemplates then existing, and not subsequently created offices. Fourthly, the office must be executed for himself, and on his own account. Here he was a mere deputy of the overseer. In *Bennett* v. *Edwards* (*a*) *Holroyd* J. says, "He may be appointed generally to do all the duties *as a deputy*." Secondly, the appointment is bad, because it does not specify the duties to be performed, as required by the 59 *G.* 3. *c.* 12. *s.* 7. It is also bad for want of a stamp. By the statute 55 *G.* 3. *c.* 184. *sched.* tit. *Grant*, any grant or appoint-

(*a*) 7 *B. & C.* 586.

1828.

The KING against The Inhabitants of LEW.

ment by his Majesty, his heirs or successors, or by any other person or persons, of or to any office or employment by letters patent, deed, or other writing, where the salary, fees, or emoluments appertaining thereto shall not amount to 50*l.* per annum, requires a stamp of 2*l.* Here the appointment was made by the magistrates in writing, and the emolument was less than 50*l.* per annum, it therefore required a stamp.

Taunton and *Chilton*, contrà, [were desired by the Court to confine their argument to the question whether the appointment required a stamp.] The statute 55 *G.* 3. *c.* 184. *sched.* tit. *Grant*, was evidently intended to apply to patent and corporate offices and others ejusdem generis, and not to parochial offices. At the time when that statute passed, the office of assistant overseer did not exist. Besides, it is derived from the parishioners, though the appointment is required to be sanctioned by two magistrates, and therefore is not an appointment within the meaning of the act of parliament.

BAYLEY J. I have no doubt that the pauper held a public office or charge within the meaning of the statute

[redacted]

1828.

The KING *against* The Inhabitants of LEW.

year in his office, defeasible on a particular event; as in the case of a lease for a year, determinable by notice within the year. In that case the lessee is in of the estate for the year, though it may be determined by notice, *Rex* v. *Herstmonceaux* (*a*). The office held by the pauper was held by him in his own right, and not as the deputy of the principal overseer. The office of assistant overseer is separate and distinct from that of principal overseer. The great difficulty in this case arises from the want of a stamp. The statute 55 *G.* 3. *c.* 184. *sched.* tit. *Grant*, requires that any grant or appointment made by any person or persons of or to any office or employment, by writing, where the salary, fees, or emoluments appertaining thereto shall not amount to 50*l.* per annum shall have a stamp of 2*l.* If I were at liberty to conjecture, I should say that the legislature did not contemplate an appointment of this description; but I am bound to give effect to the words used in this act of parliament. The statute 59 *G.* 3. *c.* 12. *s.* 7. authorizes the inhabitants of any parish in vestry assembled to nominate and elect any discreet person to be assistant overseer of the poor, and to determine and specify the duties to be by him executed, and to fix such yearly salary for the execution of the said office as shall by such inhabitants in vestry be thought fit; and then it authorizes any two justices by warrant to appoint any person so elected, and declares that every person so appointed shall continue to be an assistant overseer until he shall resign such office, or until his appointment shall be revoked. The assistant overseer is required to be appointed by two justices by their

(*a*) 6 *B.* & *C.* 550.

1828.

The King against The Inhabitants of Law.

warrant in writing. Here the pauper was appointed by a warrant in writing. It is an appointment in writing to an office or employment where the yearly salary does not amount to 50*l*. It, therefore, is within the very words of the act, and required a stamp.

LITTLEDALE J. I think this appointment required a stamp. I cannot get over the words of the act of parliament. There are general exemptions at the end of that part of the schedule of the stamp act which relates to appointments to offices, but this is not within them. I have no doubt on the other point. This is called an office in the act of parliament. It is from the nature of the thing an office. If an overseer be an officer, an assistant overseer is equally so. It is also an annual office; for there is an annual salary. And although he may be removed within the year, still he is appointed to the office for the year.

PARKE J. concurred.

Order of sessions confirmed.

1828.

The KING *against* The Inhabitants of CHRIST CHURCH.

John Gyles, the pauper's husband, occupied part of a house in *Warwick-lane*, in the parish of *Christ Church*, of the yearly value of 20*l.*, for several months in the year 1821, and, during that time, he was rated to, and paid two quarters' watch-rates for the ward of *Farringdon Within*, in which ward the said house is situated. The city of *London* is divided into twenty-six wards, and the wards into precincts. The ward of *Farringdon Within* contains seventeen precincts, and the house, in respect of which the watch-rates were paid by *J. Gyles*, is, with regard to ward-matters, in *Saint Ewin*'s, and not in *Christ Church* precinct. The watch-rate is made by the alderman and common-councilmen of each ward, under the authority of the statute 10 *G.* 2. *c.* 22. *s.* 2., which enacts, "for the better raising and levying of monies for paying the wages of the watchmen and beadles, and other charges incident thereto; that the mayor, aldermen, and commons of the said city of *London*, in common council assembled, every year, shall then and there determine and direct what sum and sums of money shall be raised and levied upon each respective ward for answering the purposes aforesaid; and for raising the said several sums of money, direct the alderman, deputy, and common-councilmen of each and every of the respective wards in the said city of *London*, and liberties thereof, to make an equal rate and assessment upon all and every the person and persons who do or shall inhabit, hold, occupy, or enjoy any land, house, shop, warehouse, or other tenement within their respective wards, (regard being had, in making the said rates, to the abilities of, and likewise to the rent paid by the said several inhabitants and occupiers so to be rated and assessed;) and the alderman, deputy, and common-

1828.

The King against The Inhabitants of Christ Church.

councilmen of each ward of the said city are hereby authorized and required to make such rate and assessment for their respective wards, in such manner and form as shall be so directed by the said court of common-council, which said rates or assessments shall be collected quarterly from the several inhabitants or occupiers in each of the said several wards, by the several constables for the time being of the several precincts, or by the beadles in each of the said respective wards, as the alderman, deputy, and common-councilmen of each ward shall direct and appoint; and in case of non-payment, the lord mayor, or the alderman of the ward wherein the premises are situate, may grant a warrant to the collector to levy the same." The form of the watch-rates in question (varying the time for which each was respectively made,) is as follows: "*London.*—A rate and assessment made upon the several persons who inhabit, hold, occupy, and enjoy any land, house, warehouse, or other tenement within the ward of *Farringdon Within* (the precincts of *Blackfriars* and *Monkwell* excepted,) for raising money to pay the watchmen and beadles appointed for the said ward, and other charges, incident thereto, (except the watchmen of the aforesaid

1828.

The KING *against* The Inhabitants of CHRIST CHURCH.

Adolphus in support of the order of sessions. The pauper gained a settlement by payment of the watch-rate, by virtue of the statute 3 *W.* 3. *c.* 11. *s.* 6. The watch-rate undoubtedly is not a parochial rate; but *Rex* v. *Bramley* (*a*) shews, that payment of a tax, which is not a parochial tax, confers a settlement. There the pauper was held to have gained a settlement by the payment of land-tax.

Bolland, contrà, was stopped by the Court.

BAYLEY J. The land-tax was holden to be within the act from the notice of inhabitancy that arises by the party's having been assessed, and paid it. Payment towards a county bridge gives no settlement, because the person pays as an inhabitant of the county, and not of the parish (*b*). This watch-rate is not a parochial tax, nor is it collected by any officer belonging to the parish. The parish had not notice that the party who paid the watch-rate was an inhabitant of the parish. No settlement, therefore, was gained, and the order of sessions must be quashed.

Order of sessions quashed.

(*a*) *Burr. S. C.* 75. (*b*) 2 *Nol. P. L.* 123. citing *Cases of Sett.* 1.

1828.

The KING *against* The Inhabitants of the Parish of ST. ANDREW the GREAT, in the Town and County of CAMBRIDGE.

Where it was made a question of fact at the sessions, whether there was a hiring and service for a year in the appellant parish, and the sessions confirmed the order of removal, subject to the opinion of this Court as to a settlement being gained there by hiring and service: Held, that this amounted to a finding by the justices at sessions that there was a hiring and service for a year in that parish, and that such finding ought not to be

UPON appeal against an order of two justices, whereby *Mary Ann Farrant*, single woman, was removed from the parish of *Ely, St. Mary*, in the Isle of *Ely*, to the parish of *St. Andrew the Great*, in the town and county of *Cambridge*, the sessions confirmed the order, subject to the opinion of this Court on the following case: —

It was proved that the pauper was hired to a Mrs. *Furbank* as nursery-maid, in the parish of *St. Andrew the Great*, in *Cambridge*, and lived there for five months; that she then went to Miss *Henley*, a straw bonnet-maker in the same parish, and asked her if she could give her work in her business, which she said she would for a fortnight or three weeks; that she did give her work for that time, two shillings a week, and her board, and that during this period the pauper lodged at her

1828.

The KING *against* The Inhabitants of ST. ANDREW the GREAT, CAMBRIDGE.

clothes behind her; that she asked Miss *Henley*'s leave to go, who gave her some pocket-money; that she stayed with her mother three weeks, and returned without any order from Miss *Henley*; that she went a second time to see her mother, had leave for one week, but stayed three, and, finally, left Miss *Henley* three weeks after her return. She staid altogether about fifteen months, did the household work, and after having done that, she went to the straw-bonnet work. During the time the pauper remained in the house, Miss *Henley* had no other servant. If the Court of King's Bench shall be of opinion that a settlement by hiring and service was gained in the parish of *St. Andrew the Great* under the above circumstances, the order of sessions is to be confirmed. If the Court of King's Bench shall be of a contrary opinion, then both orders are to be quashed.

Biggs Andrews, in support of the order of sessions. The question raised by the evidence in this case was, Whether there was a contract of hiring for a year? That was entirely a question of fact, and the decision of it belonged to the justices at sessions. They, by confirming the order of removal, have decided that there was a contract for a year, and there was sufficient evidence to warrant them in coming to that conclusion. It is clear that a general indefinite hiring is a hiring for a year, unless there be something to raise a presumption to the contrary, *Rex* v. *Stockbridge* (*a*) and if a person be hired for less than a year, and serve for three years, a contract for a year may be inferred. In the case of *Rex* v. *Christ's Parish, York* (*b*), and in *Rex* v.

(*a*) *Burr. S. C.* 759. (*b*) 3 *B.* & *C.* 469.

Trow-

1828.

The King against The Inhabitants of St. Andrew the Great, Cambridge.

Trowbridge there cited, the paupers were hired so long only as they chose to stop, and the same observation applies to *The King* v. *Great Bowden* (*a*).

Flanagan and *Kelly* contrà. A contract for a year's service ought not to have been inferred by the sessions from the facts stated. Undoubtedly, if a general hiring only had been stated, that would have been a hiring for a year. But all the facts stated must be taken together. Here it appears that the pauper was hired in the first instance for a fortnight or three weeks, and that during that time she lodged at her uncle's in another parish; that she then went into Miss *Henley's* house, who told her that she might sleep there, and that when she wanted clothes she would find them for her; and that very shortly after coming into the house to sleep, Miss *Henley* told her she might provide another place for herself elsewhere. The fair inference from these facts is, that the weekly hiring originally bargained for continued, and that the pauper being afterwards lodged in her mistress's house was to receive clothes instead of wages.

[redacted]

1828.

The KING *against* The Inhabitants of ST. ANDREW the GREAT, CAMBRIDGE.

which she served under that contract she lodged at her uncle's house, and received weekly wages. After that she was told by Miss *Henley* that she might sleep in her house, and that when she wanted clothes, she, Miss *Henley*, would find them for her. From this it may therefore be inferred, that both parties at that time contemplated that there should be a continuation of the service beyond the period required by a weekly hiring, until at least the pauper had earned the value of her clothes. The justices may have thought that that was an indefinite hiring, and if so, that it was a hiring for a year. It is true that Miss *Henley* afterwards told her that she might provide a place for herself elsewhere when she could. But if there was once a contract for a year, that could not be varied without the consent of both parties. Afterwards, from time to time, she had leave to go home, but there was no dissolution of the contract. Upon the ground, therefore, that if there be premises to warrant the sessions in the conclusion to which they have come, it is not for this Court to say that they have come to a wrong conclusion upon a question of fact, we think that their decision in this case ought not to be disturbed.

LITTLEDALE J. It was for the justices at sessions to decide the question, whether there was a contract of hiring for a year. There were premises from which they might draw the conclusion that there was such a contract. From the same premises I, perhaps, should have drawn a different conclusion; but the justices having decided the fact, I am of opinion we ought not to disturb their decision.

PARKE

1828.

The King against The Inhabitants of St. Andrew the Great, Cambridge.

Parke J. It is not necessary to say what my decision would have been upon the evidence stated in this case. The question whether there was a contract of hiring for a year, was entirely a question of fact which it was for the justices at sessions to decide. They have decided it. There were premises to warrant the conclusion to which they have come, and their decision ought not to be disturbed.

Order of sessions confirmed. (a)

(a) See the three following cases.

The King *against* The Inhabitants of Rosliston in the County of Derby.

Where the court of quarter sessions have found, upon a case stated, that there was no general hiring, this Court will not disturb their decision, if there appear to have been any premises to warrant it.

Upon appeal against an order of two justices, whereby *R. Taylor*, his wife, and one infant daughter not then christened, were removed from the parish of *St. Michael*, in the city and county of the city of *Lichfield*, to the parish of *Rosliston*, in the county of *Derby*, the sessions confirmed the order, subject to the opinion of this Court on the following case: —

Richard Taylor, the pauper, on the 6th of *February*

1828.

The KING *against* The Inhabitants of ROSLISTON.

after the horses, cows, and sheep, and attended to the general business of the farm. *Slater* gave the pauper his board, some clothing, and also some money at different times, and the pauper continued in such service in *St. Chad*'s parish for thirteen months, and then ran away, because *Slater* beat him. *Slater* never sent after the pauper, nor did the pauper ever offer to return to *Slater*'s service; but a few days after he had run away, he went to *Slater*'s for his hat, which *Slater* refused to give him. The pauper, on his cross-examination by the respondent's counsel, stated, that at the time of hiring *Slater* did not say that he (the pauper) might go away when he pleased, or that *Slater* might turn him away when he pleased. The court of quarter sessions were of opinion that there was no general hiring in the parish of *St. Chad*, otherwise *Stowe*.

Shutt in support of the order of sessions. It was a question of fact for the justices at sessions to decide, whether or not there was a contract of hiring for a year. They have found that there was no general hiring, and there were premises to warrant them in coming to that conclusion.

Whately contrà. There was a general hiring in this case, no particular period having been mentioned for the continuance of the service. Here the master told the pauper's mother, that, let him stop what time he would, he, the master, would give him satisfaction, if not in money, in clothes. He used an expression, therefore, which referred to an indefinite service. That, consequently, was a general hiring. He cited *Rex* v. *Wincaunton* (*a*),

(*a*) *Burr. S. C.* 299. 1 *Nol. P. L.* 367.

Rex

1828.

The KING *against* The Inhabitants of ROSLISTON.

were premises to warrant them in coming to that conclusion; and consequently we ought not to disturb their decision.

LITTLEDALE J. I think there were sufficient premises to warrant the justices in deciding that there was no general hiring in this case. I probably should have drawn a different conclusion from the facts stated, but it was a question of fact to be decided by the sessions, and their decision ought not to be disturbed.

PARKE J. concurred.

Order of sessions confirmed.

The KING *against* The Inhabitants of EDWINSTOWE.

Relief given to a pauper while he is residing out of the relieving parish, is prima facie evidence of a settlement in that parish; and evidence of one instance in which relief was so given was held to be sufficient to warrant a finding by the sessions that the pauper was settled in the relieving parish, although upon a second application relief had been refused.

UPON an appeal against an order of two justices, whereby *Sarah Dewick* and her two children were removed from the parish of *Mansfield*, in the county of *Nottingham*, to the parish of *Edwinstowe*, in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case: —

The pauper, at that time resident in *Mansfield*, applied for relief to Mr. *Bullivant*, the overseer of the appellant parish, at a public-house in *Mansfield*, a distance of seven miles from *Edwinstowe*, on a market day; he gave her three shillings as relief, and said if she wanted further relief she must apply to him again at *Edwinstowe*, and he would give it her. A fortnight after the pauper went for relief to *Edwinstowe*, when she

1828.

The King against The Inhabitants of Rawlestowe.

she saw Mr. *Bullivant* and Mr. *Sykes*, the other overseer. They then refused to give her relief, saying, she must throw herself upon the parish of *Mansfield*.

N. R. Clarke in support of the order of sessions. Relief given to a pauper out of the relieving parish, is primâ facie evidence that the pauper at that time is settled there. The relief given in this case was some evidence of an admission by the parish officers of *Edwinstowe*, that the pauper was so settled, and the presumption arising from that evidence was not rebutted. There were premises to warrant the conclusion drawn by the sessions, that the pauper was settled in *Edwinstowe*. It was a question for the sessions, and they have decided it.

Fynes Clinton contrà. The sessions have drawn a wrong conclusion from the evidence. The giving of relief amounts to no more than shewing the opinion of the parish, that the pauper was settled there, *Rex* v. *The Inhabitants of Maidstone* (*a*). But here it appears that the relief was given by the parish officer when he was away from home, and had no opportunity of as-

1828.

The KING *against* The Inhabitants of EDWINSTOWE.

the justices at sessions have come, we are bound to reverse their decision. I do not say that, from the facts stated in the case, I should have drawn the same conclusion which the justices have done. But it was a question of fact; and it was for them to draw their conclusion from the evidence. Before we reverse their decision, we must see clearly that they were wrong. It is not sufficient that the evidence in support of their conclusion is slight. The question is, Whether there was any evidence to warrant the justices in coming to the conclusion? It appears that at the time when the relief was given, the parish-officer was at a distance from home. It is possible, however, that he may have known that the pauper was settled in *Edwinstowe*. If he did not know it, he might have said to the pauper, "I cannot tell whether you are settled in the parish or not, and I give you this whether you are settled there or not." But he gave the relief in an unqualified manner, and seems to have acted on the principle, that he conceived there was an obligation on his part to grant relief, and a right in her to demand it. It was for the sessions to draw their conclusion from these facts. There was some evidence upon which they might exercise their discretion; and though I might, perhaps, have come to a different conclusion, I think we are not at liberty to reverse their decision.

LITTLEDALE J. I concur in the judgment delivered by my Brother *Bayley*, entirely on the ground that there were some premises to warrant the sessions in coming to the conclusion to which they have come. The evidence was undoubtedly very slight; but it was

1828.

The King *against* The Inhabitants of Rewinstowe.

for the sessions to draw their conclusion from it, and having done so, I think we ought not to disturb their decision.

Parke J. Upon the evidence stated in this case, I should have come to a different conclusion. But it is for the sessions and not for us to draw the conclusion from the evidence given, and they having done so, I think their decision ought not to be disturbed.

Order of sessions confirmed.

The King *against* The Inhabitants of St. Martin, in Leicester.

Where the court of quarter sessions have, from facts proved before them, drawn the conclusion, that there was an implied hiring for a year, this Court will not,

Upon an appeal against an order of two justices, whereby *F. Ward*, his wife and children, were removed from the parish of *Great Bowden*, in the county of *Leicester*, to the parish of *St. Martin*, in the borough of *Leicester*, the sessions confirmed the order, subject to the opinion of this Court, on the following case:

1828.

The KING *against* The Inhabitants of ST. MARTIN, LEICESTER.

the other lad came, but was not engaged by Mr. *Neale*, and the pauper continued in the service (without any thing following between him and *Neale*) for a period of three years and a quarter, at the end of which time the pauper, hearing that the place of ostler at another inn was vacant, went and engaged it without consulting his master, and removed into it on the following day; *Neale* telling him, that if it was his mind to go, he believed he must. The court of quarter sessions found that there was an implied hiring for a year, and confirmed the order.

Jeremy (and *Humphrey* was with him) in support of the order of sessions, was stopped by the Court.

Denman and *Reader* contrà. The facts stated in this case did not furnish any premises from which the justices could fairly draw the conclusion that there was a contract for a year's service. There must be a contract, *Gregory* v. *Pitminster* (*a*). Now, there was no contract whatever in the first instance. The pauper was merely told that he might stay for a fortnight, till the other person (who was expected) should come. Assuming, however, that the sessions might thence infer a contract for that time, there was no subsequent agreement between the parties. There was, consequently, no obligation on the pauper to continue to serve beyond that time. He might, therefore, have quitted when he pleased. Now, an express contract of hiring, with a stipulation that it may be determined at pleasure by either party, is not a hiring for a year, *Rex*

(*a*) 2 *Bott.* 183.

1828.

The King against The Inhabitants of St. Martin, Leicester.

v. *Christ's Parish, York* (a), *Rex* v. *Trowbridge* (b), and *Rex* v. *Great Bowden* (c). Where there is no contract, no hiring can be presumed from length of service, *Rex* v. *Weyhill* (d). There was no general hiring in this case which would undoubtedly be a hiring for a year. The first hiring was for a fortnight only, and it is expressly found that the pauper afterwards continued without any thing further passing between him and his master. The presumption, therefore, of any hiring for a year, is repelled.

Bayley J. I think that the justices were warranted in coming to the conclusion that there was an implied hiring for a year in the parish of *St. Martin, Leicester*. It appears that the pauper applied to *Neale*, and asked him if he wanted a servant. If *Neale*, who agreed to take the pauper into his service, had said no more than that he should have his board and lodging and the vails, that would have been a case in which the law would imply a general hiring. But the master assigns as a reason why he would not make a contract to hire the pauper for any longer period than a fortnight, that he expected another lad to come in a fortnight. The

1828.

The KING *against* The Inhabitants of ST. MARTIN, LEICESTER.

period? That question depended on the understanding existing in the minds of the parties at the time. There can be no doubt that both parties understood that the relation of master and servant was created for a fortnight in the first instance. If the justices thought that the master refused to take the pauper for a year, only because he expected another person, they might, as that person was not finally hired, taking into consideration the conversation between the pauper and the master, and the subsequent service, presume that there was a contract for a year. They might most properly have so presumed, if the master, in the first instance, had hired the pauper without having said that he expected another person to come in a fortnight. If the conversation between the master and the pauper, omitting all mention of any other person being expected, coupled with the subsequent service, would have been sufficient to raise a presumption of a yearly hiring, the justices might think that as the person so expected was not finally hired, both parties intended the relation of master and servant to continue for that period. I think, therefore, there were some premises to warrant the sessions in coming to the conclusion that there was a hiring for a year. The case of *Rex* v. *Pendleton* (*a*) is in point. There a pauper served a master under unstamped articles of agreement, to work with him for three years at certain rates of weekly wages, and under certain covenants; after which he continued to serve his master for four years longer without coming to any new agreement. It was held, that the sessions might thence presume a

(*a*) 15 *East*, 449.

1828.

The King against The Inhabitants of St. Martin, Leicester.

yearly contract. In that case there was no new agreement between the parties, and the Court inferred that the relation of master and servant existed. In this case, the justices at sessions were the proper persons to judge in what character the parties continued together after the master had refused to engage the other person whom he expected. They have exercised their judgment on that point, and I think their decision ought not to be disturbed.

Littledale J. I should have drawn a different conclusion from the facts stated. But it was a question of fact for the justices to decide whether there was a contract for a year. There were premises to warrant them in coming to that conclusion, and upon that ground only I found my opinion that the decision of the sessions ought not to be disturbed.

Parke J. concurred.

Order of sessions confirmed.

[redacted]

1828.

The KING *against* ST. ANDREW in PERSHORE, WORCESTERSHIRE.

A hiring at so much per week, a month's wages or a month's warning, is a hiring for a year.

UPON an appeal against an order of two justices, whereby *W. Horton*, his wife, and two children, were removed from the parish of *St. Andrew*, in *Pershore*, in the county of *Worcester*, to the parish of *Moreton* in *Marsh*, *Gloucestershire*, the sessions quashed the order, subject to the opinion of this Court on the following case: —

The pauper, *W. Horton*, was hired to one *Fieldhouse*, a stage-coach proprietor, to serve him as horsekeeper, and to look after his coach horses at *Moreton*, in *Marsh*, at 1*l.* a week. The terms of the hiring were a month's warning, or a month's wages. There was no further mention of the time during which the pauper should serve. The pauper continued to serve under this contract at *Moreton* in *Marsh* between two and three years. The question for the opinion of the Court was, Whether the pauper, *W. Horton*, gained a settlement under this hiring and service in *Moreton* in *Marsh*.

Godson in support of the order of sessions. By the contract, weekly wages were reserved. That, primâ facie, raises a presumption that the service was to continue for a week only. It is true that there was a stipulation for a month's wages, or a month's warning. That, at most, would raise a presumption of a monthly, not a yearly hiring.

1829.

The King against St. Andrew, Pressmore.

Campbell, contrà, was stopped by the Court.

Bayley J. I think that the sessions had not any premises to warrant the conclusion to which they came in this case. If the reservation of weekly wages be the only circumstance from which the duration of the contract can be collected, the presumption is, that it is to continue for a week only. In this case, the stipulation for a month's wages, or a month's warning, rebuts the presumption of a weekly hiring. It was thence manifest that it was intended that the service should continue for a longer period than a week. It then became a hiring unlimited in duration, in which case the law implies a hiring for a year.

Littledale J. The stipulation for a month's wages, or a month's warning, shews clearly that the contract was for a longer period than a week. That being so, and no precise time for its duration being fixed, it was a contract for an indefinite period; or, in other words, a general hiring for a year. I think that in this case, there were not premises to warrant the sessions in deciding that there was not a yearly hiring.

[redacted]

1828.

The KING *against* WILLIAMS.

To a mandamus to admit *A. B.* into the office of churchwarden, reciting that he had been duly elected, a return that *A. B.* was not duly elected, is good.

MANDAMUS to the defendant, as official and commissary of the parish of *Hornchurch* and liberty of *Havering-atte-Bower*, in the county of *Essex*, to swear and admit into the office of churchwarden *James Meakins*. The mandamus recited, that he had been duly nominated, elected, and chosen into the place and office of churchwarden of the said parish. The defendant having returned, that *Meakins* was not duly elected into the place and office of churchwarden: the case now came on for argument in the crown paper.

Brodrick. The return is insufficient. The commissary had no right to exercise any judgment on the subject. He was a ministerial officer, and was bound to swear in the churchwarden, *Rex* v. *Rice* (*a*), *Rex* v. *Simpson* (*b*). In *Rex* v. *White* (*c*), to a mandamus to swear in a churchwarden, a return that he was not elected, was held bad, on the ground that the archdeacon could not judge of the election. *Rex* v. *Harris* (*d*) is an authority to the same effect. These authorities shew that a return denying the election is bad. Here the return is that *Meakins* was not *duly* elected. The commissary, therefore, exercised his judgment, not only as to the fact of the election, but as to the validity of it. *Hereford*'s case and *Cripp*'s case (*e*), shew that such a return is bad.

(*a*) *Ld. Raym.* 138.
(*b*) *Str.* 610.
(*c*) *Ld. Raym.* 1379.
(*d*) 3 *Burr.* 1420.
(*e*) 1 *Sid.* 209.

Erle,

1828.

The Rex against Williams.

Erle, contrà, was stopped by the Court.

Bayley J. At the end of the report of *Rex* v. *White* (*a*), Lord *Raymond* adds a note, "It was certainly wrong, for the return was a good return, and has been often made to such mandamuses and actions brought upon the return, and tried;" and he refers to *Rex* v. *Harwood* (*b*). There the mandamus was directed to the defendant, a commissary, commanding him to swear in a churchwarden, and he returned non fuit electus; and it was insisted that the return was ill, that the archdeacon, who was only to obey the writ, could not judge of the election or of the qualities of a person chosen by the parish. But *Raymond* C. J. and *Reynolds* J. took the return to be good. But, being pressed with the authority of *Rex* v. *White*, and no counsel for the defendant appearing, a rule nisi was made for a peremptory mandamus. Cause was afterwards shewn; but the Court not being unanimous, it was ordered to come on again in the paper. Lord *Raymond* says, "I never heard it stirred again. There can be no doubt that it was a good return." In *Rex* v. *Ward* (*c*), it was said in argument to have been decided in *Rex* v. *Harwood*,

[redacted]

return, for it is an answer to the writ; but where it is to swear one *chosen* churchwarden, there a return that he is not *duly chosen* is nought, because it is out of the writ, and evasive." These authorities shew that the return in the present case is good.

LITTLEDALE J. The commissary has a right to say by the return, that he is not bound to do the thing which he is required to do by the mandamus. Here he does say so, by shewing that the party was not duly elected.

PARKE J. The commissary may deny any material allegation in the writ. He cannot exercise any judicial authority, but he may inquire whether the party has been duly elected, otherwise he would be bound to admit any person who presents himself for admission, even if he knew the fact to be that such person was never elected. The party who obtains the mandamus states the foundation of his right in the writ. The commissary may deny it. In this case he has done it, by shewing that the party who seeks to be admitted was not duly elected. The return, therefore, is sufficient, and the judgment must be for the defendant.

Judgment for the defendant. (*a*)

(*a*) A return is good if it pursues the suggestion of the writ. *Rex* v. *Penrice*, *Strange*, 1235. *Rex* v. *Hill*, 1 *Shower*, 253.

1828.

The KING *against* The Inhabitants of GREAT DRIFFIELD.

A man living in parish *A.* under a certificate from parish *B.* cannot gain a settlement in the former parish by purchasing an estate for money.

UPON an appeal against an order of two justices, whereby *T. Harrison*, his wife and children, were removed from the township of *Great Driffield*, in the East Riding of the county of *York*, to the township of *Garton* on the *Wolds* in the same Riding, the sessions quashed the order, subject to the opinion of this Court on the following case.

The pauper, *T. Harrison*, never acquired any settlement in his own right. The pauper's grandfather resided at *Garton*; his son (the pauper's father), whilst living with him at *Garton*, was bound an apprentice to one *Lyon* a shoemaker, who was then residing at *Great Driffield*, under a regular certificate from the parish of *Kirkburn*, as the pauper then knew. The indenture, which was in the usual form, and regularly stamped and executed by all parties, was dated the 25th day of *March* 1786, and stated that the apprentice was thereby bound for the term

1828.

The KING *against* The Inhabitants of GREAT DRIFFIELD.

chased a cottage in *Great Driffield* for the sum of 110*l.*, of which 30*l.* was paid by him, and the remaining sum of 80*l.* was paid by one *Elizabeth Day*. And the same was thereupon duly conveyed by an indenture of feoffment, with livery of seisin indorsed, bearing date the 10th day of *May* 1792, unto *Lyon* and his heirs, to the use of *Elizabeth Day*, her executors, administrators, and assigns, from the day next before the date thereof for the term of 500 years, subject to a proviso thereinafter contained for redemption of the said premises, with remainder to the use of the said *R. Lyon*, his heirs, and assigns for ever. The said indenture also contained a proviso for making void the said term on payment by *Lyon*, his heirs, executors, administrators, and assigns, unto *E. Day*, her executors, &c. of the sum of 80*l.* with interest for the same, on the 10th of *November* then next, and *Lyon* occupied the cottage until his death. The apprentice served *Lyon* in *Great Driffield* for more than forty days after *Lyon* had purchased the cottage, and then resided with *Lyon*. The father of the pauper did no other act to gain a settlement; and if by the apprenticeship and service he gained no settlement in *Great Driffield*, the place of his and the pauper's last legal settlement is *Garton*, where the pauper's grandfather was legally settled.

The question for the opinion of this Court was, Whether, under the circumstances above set forth, the father of the pauper gained a settlement in *Great Driffield*, by being bound to and serving the said *R. Lyon* as aforesaid?

Reader and *Kennedy* in support of the order of sessions. The pauper's father gained a settlement in *Great Driffield*,

1828.

The King against The Inhabitants of Great Driffield.

Driffield, by apprenticeship. By 12 *Ann. c.* 18. *s.* 2. no estate would be gained by the apprentice by service to a certificated man. But the master's certificate was discharged by his having bought an estate. The master, therefore, gained a settlement by estate, and the apprentice gained a settlement by serving the master forty days after the certificate was discharged. First, the master gained a settlement by estate. The stat. 9 & 10 *W.* 3. *c.* 11. enacts, "that no person who shall come into any parish by certificate shall be adjudged by *any act whatsoever* to have procured a legal settlement in such parish, unless he or they shall really and bonâ fide take a lease of a tenement of the value of 10*l.*, or shall execute some annual office in such parish, being legally placed there." It will be said, that the statute prevents a man from gaining a settlement by any other than the two modes mentioned in the statute; and that to hold that a settlement is gained by the purchase of an estate for a pecuniary consideration, is a departure from the words of the statute. In *Burclear* v. *Eastwoodhey* (*a*) it was held, that a certificated man might become settled by residence on his own estate, where it did not come to him by any act of his own, but by act and operation of law. In *Ivinghoe* v. *Stonebridge* (*b*), the

[redacted]

settlement. *Lee* C. J. there said, "The statute 9 & 10 *W.* 3. hath received a liberal construction, and hath been held to give a settlement, both by descent, by devise, and purchase. *Rex* v. *Deddington* (*a*) was the case of a certificated man, who purchased an estate for 42*l.*, and there it was insisted that it was distinguishable from *Burclear* v. *Eastwoodhey*, because, in that case, it was not his own act (as a purchase is) but it came to him by act and operation of law. But the Court did not think this a sufficient distinction, and said a purchase was in its nature an excepted case.

Alderson and *Archbold* contrà. The words of the statute 9 & 10 *W.* 3. *c.* 11. are decisive upon this point. They in express terms prevent a certificated man from gaining a settlement subsequently to his coming into the parish by any other act than by renting a tenement of 10*l.* a year, or by executing some annual office. The purchasing of an estate is an act done by the party, but it is not one of the acts mentioned in the statute. The statute says, that such a person shall gain a settlement only by two acts. It is contended that he may by a third. The cases in which it has been held that a settlement has been gained by an estate coming to a certificated man by act and operation of law, were correctly decided; for there the settlement is not procured by any act on his part. Such a case, therefore, is not within the prohibition of the statute. The case will be clear by examining the foundation on which this law of settlement depends. Originally a mere residence of forty days gave a settlement. Then came the 13 & 14 *Car.* 2., by which

(*a*) *Burr. S. C.* 220.

justices

1828.

The King against The Inhabitants of Great Dalton.

justices of peace were empowered to remove persons coming to settle on a tenement of less than 10*l.* within the forty days. But even these persons after forty days gained a settlement as before. By the 3 *W. & M. c.* 11. however, the forty days mentioned in the 13 & 14 *Car.* 2. were to be computed from the delivery of a notice in writing. This introduced the distinction between removable and irremovable persons. In the latter class the forty days were computed from the original coming to settle as before. But this statute enumerated several other acts whereby a settlement could be gained, such as service, apprenticeship, executing an office, or paying rates. These were in addition to the act of taking a tenement before mentioned in the 13 & 14 *Car.* 2. Then came the 9 & 10 *W.* 3., by which a certificate man was prohibited from gaining a settlement by any act except *two* of those mentioned in the former statutes: and this is confirmed by the recital, which mentions the doubt whether the certificate was not of itself a notice in writing, so as to bring the party within the 3 & 4 *W.* 3. Notwithstanding the statute of 9 & 10 *W.* 3., however, a certificate man might have gained a settlement by residing on his own estate, whatever the value might be,

son living under a certificate from taking an apprentice, so as to throw a burden on the certified parish.

Cur. adv. vult.

1828.

The KING *against* The Inhabitants of GREAT DRIFFIELD.

BAYLEY J. now delivered the judgment of the Court: The question for our consideration is, Whether the pauper's father gained a settlement in the township of *Great Driffield* by serving as an apprentice to a person who resided there under a certificate from another parish. In support of the order of sessions, it was contended that he did; because the certificate was discharged by the master's having acquired a settlement in *Great Driffield*, by the purchase mentioned in the case; and if so, it was argued, that the subsequent service to the master, after he ceased to reside under the certificate, though by virtue of a binding made to him whilst he was so residing, was sufficient to confer a settlement on the apprentice. It is unnecessary to decide the latter question, if no settlement was gained by the master, by the purchase which he made; and we are of opinion that no settlement was gained. The statute 9 & 10 *W.* 3. *c.* 11., after reciting the 8 & 9 *W.* 3. *c.* 30. (the certificate act), and also reciting that some doubts have arisen upon the construction of the said act, by what acts any person coming to inhabit and reside within any parish, by virtue of any such certificate, may procure a legal settlement in such parish, enacts, "that no person or persons whatsoever, who shall come into any parish by such certificate as aforesaid, shall be adjudged, *by any act* whatsoever, to have procured a legal settlement in such parish, unless he or they shall really and bonâ fide take a lease of a tenement of the value of 10*l.*, or shall execute some annual office in such parish, being legally

1828.

The King against The Inhabitants of Great Driffield.

placed in such office." By the express words of this statute no settlement can be obtained by the certificated pauper, by any act whatsoever; that is, as the context shews, by any act whatsoever done by the pauper, other than the two which are pointed out by the act. The purchase by the pauper of an estate, for a sum of money, is an act done by him other than those mentioned in the statute; and, according to the plain and ordinary import of its words, he cannot procure by it a settlement in the parish. But we are bound to construe every statute according to the plain and ordinary import of its words, and to act upon that construction, unless we should find ourselves bound by an uniform course of well-considered decisions, giving a different effect to the provisions of the statute; or unless that construction would lead to such consequences, that we can safely pronounce that the legislature must have had a different intention from that which the ordinary import of the words conveys.

It will be found, however, upon referring to the several decisions, that they are few, and that they are founded in some degree upon a mistaken supposition that the point properly arose and was decided in

1828.

The KING *against* The Inhabitants of GREAT DRIFFIELD.

was cast upon him by act and operation of law. Other reasons are, it is true, assigned in the judgment of the Court, but it may be supported upon that ground; for a settlement acquired by operation of law, is not acquired by any act of the pauper, and is, therefore, not prohibited by the statute 9 & 10 *W.* 3. In that case, one *Hackett* lived in the parish of *Eastwoodhey*, with a certificate from *Burclear*; his wife's father surrendered to her use a copyhold in *Eastwoodhey*, upon which they resided five years, and then the wife died. The husband afterwards asked relief in *Eastwoodhey*, from which he was removed to *Burclear*; and the question was, Whether his residence upon this copyhold gave him a settlement in *Eastwoodhey?* and, per Curiam, "The 9 & 10 *W.* 3. is not explanatory, but new; and, therefore, to receive a liberal construction. The exceptions in the statute prove this case more reasonable than either of those mentioned. If a certificate-man, by taking a tenement of 10*l.* a year, gain a settlement à fortiori, shall he who has an estate of his own, especially in this case, *where he does not come to it by his own act*, which might savour of fraud, but it is cast upon him by the act and operation of law? If he who serves a parish office gains a settlement by reason of his presumed ability, with greater reason shall he who has ability of his own visible to all the world. It has been adjudged that any other person, by the descent or purchase of a freehold or copyhold, or by becoming entitled to a lease for years, gains a settlement; and it cannot be supposed the legislature intended to put a certificate-man in a worse condition." The Court, therefore, seemed to think that a certificated man might gain a settlement by estate coming to him by purchase. But that was

1828.

The King against The Inhabitants of Great Driffield.

not a case of purchase; and where an act of parliament says, in distinct terms, that a certificated man shall gain a settlement in two modes only, we are not at liberty to say he may gain it by any other. There the estate came to the pauper, not by his own act, but by act and operation of law — by voluntary surrender of the copyhold to his wife. That case occurred before the 9 *G.* 1. At that period a party might gain a settlement by the purchase of an estate of any amount. The next case was *Ivinghoe* v. *Stonebridge* (*a*). This case decided that an apprentice to a certificated man gained a settlement in the year 1709, because it was prior to the statute 12 *Anne,* prohibiting such apprentices from gaining a settlement. The opinion of the Court that the purchase of an estate made the certificate-man a settled inhabitant, was expressly founded on the decision in the former case of *Burclear* v. *Eastwoodhey*, and was, also, extrajudicial. These two cases are not of sufficient weight to induce us to say, in the teeth of the words of the act of parliament, that a settlement may be gained by purchase, which is an act done.

I come now to cases where the estates have been acquired by purchase for money. The first case of a

1828.

The KING *against* The Inhabitants of GREAT DRIFFIELD.

believe, a purchase too, has been determined to gain a settlement after forty days' residence upon the foot of a person not being removable from his own, and as not being an intruder within the meaning of the 13 & 14 *Car.* 2. *c.* 12.; so that, whenever a man has an interest of his own, though under 20*l.* a year, he shall not be removable by that statute. The present question turns, indeed, upon the construction of the certificate act. Now, though this person was a certificate-man, yet, if he had come to this by *act of law*, it would have gained him a settlement; and, I *believe*, it has been so determined in case of purchases too. I think the same construction has been made upon this act as upon that of the 13 & 14 *Car.* 2." In the following term, in the case of *Rex* v. *The Inhabitants of Deddington* (*a*), it was decided, that a purchase by the certificated man for the sum of 42*l.* gained a settlement, expressly upon the authority of *Burclear* v. *Eastwoodhey*. Lord C. J. *Lee* says, that, in that case, the purchase was most plainly neither of the two cases mentioned in the act; and he observes, that a purchase was a matter of as much notoriety or more than the renting of a tenement of 10*l.* a year; that the construction ought to be agreeable to that which has been put on the 13 & 14 *Car.* 2. *c.* 12., under which any man is irremovable from a tenement of his own, and that if the construction were different, a person could not gain a settlement by a purchase of 5000*l.* per annum. In *Rex* v. *Cold Ashton* (*b*), *D. Harrison* and wife lived in *Cold Ashton* under a certificate from *Woodchester*. The wife's father died intestate, leaving a leasehold for ninety-nine years in

(*a*) *Burr. S. C.* 220. 2 *Str.* 1193. (*b*) *Burr. S. C.* 444. 2 *Bott*, 530.

1828.

The King against The Inhabitants of Great Dalwhinnie.

Cold Ashton, determinable on lives. *D. Harrison* and wife lived upon it twenty-nine years. *It came to the husband, not by his own act, but by act of law.* Lord *Mansfield* said, "The question is, Whether he is within the 9 & 10 *W.* 3., which mentions only two methods whereby certificated persons can gain settlements? But an estate of a man's own, from which he cannot be removed, has been by construction (and a reasonable one, too,) held not to be within the act, for it would be hard to remove a man from his own. The principle of the determination is, because property of a man's own is a stronger case than hiring another person's of 10*l.* a year value." It should be remembered, however, that although a man may not be removable from his own, it does not follow that he will gain a settlement by residing on it. In *Rex* v. *Long Wittenham* (*a*), *J. Westal* was certified in *Upton*; he bought a cottage for 5*l.*, lived in it nineteen years, and died. His widow *Jane* lived on it ten weeks after his death, and the question was, whether she thereby gained a settlement. Lord *Mansfield* C. J., "Magna charta says that a widow shall have her forty days; and, therefore, there is no doubt she was irremovable for forty days,

1828.

The KING *against* The Inhabitants of GREAT DRIFFIELD.

grant parcels of the waste for small pecuniary considerations, and that the pauper was admitted upon payment of 1*s.* fine, 1*s.* heriot, and 1*s.* quit-rent. It was insisted that this grant was voluntary, and vacated the certificate. But the Court decided, that such a grant of a copyhold, with 1*s.* fine and 1*s.* heriot, was a purchase within the 9 *G.* 1. *c.* 7. *s.* 5. I mention the case to shew what was the impression on the minds of *Ashhurst* and *Buller* Js. as to the construction of the statute 8 & 9 *W.* 3. *Ashhurst* J. says, "If it were necessary to give any opinion upon the point, whether, supposing this to be a voluntary grant, the party would gain a settlement, I should have wished the matter to have undergone further discussion. It seems extraordinary that, in the teeth of an act of parliament, this matter should have been taken for granted; nothing can be stronger than the words of the certificate act (which he then recites). It is singular that a practice should have prevailed in opposition to this act of parliament, when the words are so strong." *Buller* J. says, "I reserve to myself the consideration of the question, what effect a voluntary gift would have on a certificate-person as to the giving of a settlement. I agree that, under the act of the 9 *G.* 1. *c.* 7. *s.* 5., the word '*purchase*' has not the same extensive sense as is generally annexed to it. But no case has been cited at the bar, where a certificate has been discharged by a voluntary gift." These two learned Judges must have been satisfied that there was a material distinction between a case, where the estate was obtained by purchase, and where it was obtained by voluntary gift.

We do not feel ourselves bound by these decisions to put

1828.

The King against The Inhabitants of Great Dalfibsen.

a construction upon the statute at variance with the plain and ordinary meaning of its words. It is clear that these decisions have proceeded in part upon a misapprehension of the precise point decided in the case of *Barclear* v. *Eastwoodhay*. The other reasons assigned in giving these judgments do not appear to us satisfactory; the thing seems to us to turn upon the notoriety of the purchase. There is no question whether the certificated man would be removable during the time of his living in the parish, and being the proprietor of an estate, but whether he acquired a settlement; and with respect to the similarity of construction to be put upon this statute, as on the 13 & 14 *Car.* 2., it is to be observed that the words are very different, and that, looking at the recital in the latter statute, which applies to poor persons going from one parish to another, and endeavouring to settle themselves where there is the best stock, and at the enactment which authorizes the removal of *such* persons only as are mentioned in the recital, it is clear that it never meant to apply to persons who had estates in the parish in which they came to settle. We think, also, that no mischief will follow from the construction which we put on the statute of 9 & 10 *W.* 3., for though, on the one

1828.

The KING *against* The Inhabitants of GREAT DRIFFIELD.

as in *Rex* v. *Ufton* (*a*), which may, perhaps, be considered as an estate not acquired by any act done by the party.

We are, therefore, of opinion, that the statute 9 & 10 *W.* 3. prevents any settlement, by reason of an estate acquired by the act of the pauper, by a purchase in the ordinary and usual sense of that word; but it does not prevent the acquisition of a settlement by reason of an estate devolving on the pauper by operation of law, or acquired by purchase, in the technical sense of that word.

Order of sessions quashed.

(*a*) 3 *T. R.* 251.

DANIEL EDGE *against* PARKER.

Where the assignees of a bankrupt enter the premises of a third person to seize goods, which were the property of the bankrupt, it is not necessary that an action against them should be brought within three months after the fact committed; the act of the assignees not being done "in pursuance of the statute," within the meaning of the 6 *G.* 4. *c.* 16. *s.* 44.

TRESPASS for breaking and entering the premises of the plaintiff, and seizing his goods. Plea, not guilty. At the trial before *Park* J., at the last Spring assizes for *Staffordshire*, it appeared that the defendant as assignee of *Timothy Edge*, a bankrupt, on the 6th of *October* 1827 entered the plaintiff's premises, and seized certain goods, which the jury found were the property of the bankrupt; the writ was not sued out until the 25th of *January* 1828, and it was objected for the defendant, that he was protected by the 6 *G.* 4. *c.* 16. *s.* 44. (*b*), the action not having been commenced within three

(*b*) By which it was enacted, that "every action brought against any person *for any thing done in pursuance of this act*, shall be commenced within three calendar months next after the fact committed; and the defendant

1828.

Eddis against Parker.

three calendar months after the fact committed. The learned Judge overruled the objection, and the plaintiff obtained a verdict for the breaking and entering, but not for the taking of the goods. In *Michaelmas* term a rule nisi for a nonsuit was obtained, against which

Campbell now shewed cause. The protection given by the forty-fourth section of the 6 *G.* 4. *c.* 16. does not extend to such cases as the present. If it were otherwise, the greatest injustice might be done. A party whose goods had been wrongfully taken, might be abroad or otherwise absent from home, and not know any thing about the trespass until after the expiration of three months; he would then be altogether without remedy, although there could be no doubt as to the injustice of the seizure. The words of the forty-fourth section will be satisfied by applying them to the actions against commissioners mentioned in the forty-first, forty-second, and forty-third sections, and to those mentioned in section 31. against persons acting in obedience to a warrant granted by commissioners. The assignees of the bankrupt are not mentioned in any section preceding the forty-fourth, and cannot have been con-

parts of the act give them a title to all the bankrupt's property, but they are not directed to seize, and, therefore, the act complained of in this case cannot properly be said to have been done "in pursuance of the act;" and, unless so done, it is not within the protecting clause, even supposing it to apply to assignees.

Richards contrà. The assignees of a bankrupt are within the protection of the forty-fourth section. The defendant took the property in question for the purpose of making a dividend amongst the creditors of the bankrupt, and, therefore, was acting "in pursuance of the statute." That expression does not mean that the act done should be strictly within the powers given, for then the limitation of the action would be useless, for the assignee would be at all events justified. It must have been intended to apply to cases where the assignee has acted bonâ fide with the intention to do only what is right, but has exceeded his authority. There are many cases in which the protection given by the 24 *G.* 2. *c.* 44. *s.* 8. has been extended to constables professing to act under a warrant, but exceeding the powers given by it. In *Parton* v. *Williams* (*a*), a warrant had been granted directing a constable to seize the goods of *A.*: he took the goods of *B.*, supposing them to be *A.*'s, and was held to be protected by the statute. *Theobald* v. *Crichmore* (*b*), *Smith* v. *Wiltshire* (*c*), and *Gaby* v. *The Wilts Canal Company* (*d*) are to the same effect. It has been said that the forty-fourth section applies only to commissioners, and those who act in obedience to their

(*a*) 3 *B.* & *A.* 330.
(*b*) 1 *B.* & *A.* 227.
(*c*) 2 *B.* & *B.* 619.
(*d*) 3 *M.* & *S.* 580.

warrants.

1828.

EDGE against PARKER.

warrants. But the words of the act are general. That *every* action brought against *any person*, for any thing done in pursuance of that act, shall be commenced within three calendar months next after the fact committed; and there does not appear to be any good reason why the protection should be given to commissioners and not to assignees.

Cur. adv. vult.

On a subsequent day, during the sittings, the judgment of the Court was delivered by

BAYLEY J. The only question in this case is, Whether the defendant is within the protection given by the 6 *G.* 4. *c.* 16. *s.* 44.? which he cannot be unless the act complained of was done in pursuance of that statute. It is not necessary to cite cases to shew that the expression "in pursuance of" is applicable only where the party can be considered as founding his act upon the power given by the legislature. Can, then, this defendant be considered as founding the act complained of upon the powers vested in him by the statute? The twenty-seventh section gives power to any person appointed by the commissioners, by their warrant under

1828.

EDGE *against* PARKER.

a warrant must be obtained from a justice of peace by the person appointed by the commissioners. Then follow clauses requiring a certain notice before any action shall be brought against the commissioners, and proof of such notice; and power is given to the defendants to tender amends. Then the clause in question is introduced; and it is to be observed, that the assignees of the bankrupt are not mentioned in the preceding part of the statute. That clause requires that every action brought against any person, for any thing done in pursuance of the act, shall be commenced within three months next after the fact committed. Was then the act of the defendant, for which this action was brought, done in pursuance of the statute? That does not give the assignee any express power to seize the goods of the bankrupt, but vests the property in him, and clothes him with all the rights resulting from the ownership of the property. But although the ownership is given to him in this manner, his acts as owner are not done in pursuance of the statute. If this were otherwise, the goods of a party abroad and wholly unconnected with the bankrupt might be seized, and he might lose all his property, and be entirely without remedy. The right construction of the clause appears to be this: if the assignee does an act directed by the statute, but does it erroneously, he is protected; but if he does the act as the result of his ownership of that which was the bankrupt's property, and not by the direction of the statute, that is not done in pursuance of the statute, and he is responsible for it. This point has been already decided by the Court of Common Pleas in *Carruthers* v. *Payne* (*a*), and although

(*a*) 5 *Bingh.* 270.

Gaselee

1828.

ENOX against PARKER.

Gaselee J. had some doubts upon the question, yet we think that decision is consistent with sound reason, and that we ought to come to a similar conclusion in this case. The verdict found for the plaintiff ought, therefore, to remain undisturbed.

Rule discharged.

BENNETT *against* EDWARDS.

An assistant overseer appointed under the 59 *G.* 3. *c.* 12., and having, by virtue of his office, the poor-rate in his custody, is liable to a penalty for refusing to produce it to an inhabitant when lawfully demanded, according to the 17 *G.* 2. *c.* 3.

Where a declaration alleged that defendant was assistant over-

ON the second trial (*a*) of this case at the *Gloucester* Spring assizes 1828, before *Park* J., a verdict was found for the plaintiff on the fourth count, which alleged:—That plaintiff, before and at the time of the committing of the offence thereinafter mentioned, was an inhabitant of the parish aforesaid; and that before and at the time, &c. defendant was the assistant overseer of that parish. And that, theretofore, to wit, on, &c. at, &c. the churchwardens and overseers made a certain rate for the relief of the poor of the said parish, and which rate was afterwards and before, &c. allowed by, &c. and published by the churchwardens and overseers of the poor of, &c.; and

[redacted]

overseer) had the said rate in his possession, yet he would not permit the plaintiff to inspect it, whereby defendant forfeited for such offence 20*l.*, &c. In last *Easter* term *Taunton* obtained a rule nisi for arresting the judgment, on the ground that it was not averred in the declaration, that it was the duty of the defendant, as assistant overseer, to exhibit the rate to the plaintiff when requested.

Campbell now shewed cause. When this case was before the court on the motion for a new trial, it was held that an assistant overseer appointed under the 59 *G.* 3. *c.* 12. *s.* 7., would be liable to the penalty imposed by the 17 *G.* 2. *c.* 3. for refusing to allow an inspection of the rate, provided the duty of keeping and exhibiting the rate-book was cast upon him by his appointment. After verdict it must be presumed, that every thing alleged was proved; the only question therefore is, Whether it sufficiently appears on the declaration that it was the duty of the defendant to exhibit the rate; The 17 *G.* 2. *c.* 3. gives the right to inspect the rate against every person who, by reason of his office, has the custody of it. Now it is alleged that the defendant, as assistant overseer, had the custody of the rate; he must, therefore, have had it by virtue of his office, and consequently was bound to produce it when requested so to do.

Taunton, *Ludlow* Serjt., and *Justice* contrà. The declaration does not bring the defendant within either the words or the meaning of the 17 *G.* 2. *c.* 3. The words are, "That the churchwardens and overseers of the poor, or other persons authorised to take care of the

poor

1828.

BENNETT *against* EDWARDS.

poor in every parish, &c. shall permit all and every the inhabitants of the parish, &c. to inspect every such rate at all reasonable times," &c. The words, "*other* persons authorised to take care of the poor," were probably introduced to include persons mentioned in the 9 *G.* 1. *c.* 7., which authorises the farming out of the poor, and cannot apply to the present defendant. Under the 59 *G.* 3. *c.* 12. assistant overseers are appointed; but they are not like deputy overseers, they are not the representatives of the overseers in all their duties, but only in those for the discharge whereof they are specially appointed. The declaration should therefore have averred distinctly that it was the duty of the defendant, as assistant overseer, to produce the rate. The right of action is not founded on the mere possession of the rate by the defendant: he may have been entrusted with it for certain specific purposes, excluding the duty of exhibiting it. The allegation that the defendant had the rate, without the addition that it was his duty to produce it, is therefore insufficient, *Max* v. *Roberts* (*a*), *Rex* v. *Everett* (*b*), *Sutton* v. *Johnstone* (*c*). It makes no difference that this motion comes after verdict, for the plaintiff was only bound to prove the facts alleged in the declaration, and it cannot be presumed that any others were proved, *Spieres* v. *Parker* (*d*); and, therefore, unless these facts disclose a good cause of action, judgment must be arrested.

BAYLEY J. According to the case of *Spieres* v. *Parker*, nothing can be presumed after verdict except that which is expressly alleged in the declaration, or which

(*a*) 12 *East*, 89.
(*b*) 8 *B. & C.* 114.
(*c*) 1 *T. R.* 493.
(*d*) 1 *T. R.* 141.

is

is necessarily to be inferred from those allegations. Here it is not expressly alleged that it was the defendant's duty to exhibit the rate; but we must see whether any fact is alleged, whence that obligation on him is necessarily to be inferred. By the 17 *G.* 2. *c.* 3., the action is given against churchwardens, overseers, and persons authorised to take care of the poor; and it is therefore said that the defendant cannot be charged unless he falls within one of those three classes. I agree that he is not a person authorised to take care of the poor within the meaning of the statute. Neither is he a churchwarden. Is he, then, an overseer? Certainly not for all purposes, but for this I think he is. The statute 59 *G.* 3. *c.* 12. *s.* 7. authorises the appointment of assistant overseers; and every person so appointed is authorised to execute all such of the duties of overseer of the poor as shall in the warrant for his appointment be expressed. And, therefore, it is not sufficient to aver that the defendant was assistant overseer; but that must be stated which expressly or by necessary implication shews that he was an assistant overseer with the duty in question cast upon him. If the duty of keeping the parish books and rates is imposed, I think the consequence follows that he must allow the inspection of them. If this were otherwise, the original overseer, when applied to for permission to inspect, might answer that he had them not; the assistant overseer might say that it was no part of his duty to exhibit them: and thus the 17 *G.* 2. *c.* 3. would be rendered inoperative. I am therefore of opinion, that when the duty of keeping the rate is imposed, the duty of allowing an inspection of it is imposed also. Now, in the count in question, it is alleged that the defendant, *as assistant overseer*, had the

1828.

BENNETT against EDWARDS.

rate in his custody; but he could not have had it in his custody *as* assistant overseer, unless it was specified in his appointment that he should have it. The allegation in this count could not therefore be satisfied without proof of its being specified in the appointment that he should keep the rate; and if that was the duty of his office, the duty of allowing the inspection of it at reasonable times resulted from it. The plaintiff has alleged that his demand was made at a reasonable time. I am therefore of opinion, that after verdict the plaintiff is entitled to recover on this count of the declaration, although it is certainly very imperfect in form.

LITTLEDALE J. The statute 17 *G.* 2. *c.* 3. makes three descriptions of persons liable to a penalty for not allowing a poor-rate to be inspected — churchwardens, overseers, and persons authorised to take care of the poor. The defendant in the present case is not a churchwarden, nor a person authorised to take care of the poor, nor a complete overseer; but, on a former occasion, the court held, that an assistant overseer having possession of the rate-books, under circumstances that make it his duty to produce them, is an overseer within the meaning of the

the purpose of collecting the rate only; but then the plaintiff must have been nonsuited; we are, therefore, bound to presume, after verdict, that the defendant was proved to be such an assistant overseer as made it his duty to produce the rate to the plaintiff; and in general we may presume, that when a person has the custody of parish books, as a parish officer, he has them for all lawful purposes for which they may be wanted. Upon the whole, then, I think our judgment should be in favour of the plaintiff, although there is only just sufficient on the record to turn the scale against the defendant.

PARKE J. I also am of opinion, that there is just sufficient on the record to warrant a judgment for the plaintiff. I find it decided in *Bennett* v. *Edwards*, that a person to be within the 17 *G.* 2. *c.* 3. need not be an overseer for all purposes; and I think that decision correct. Now, the declaration before us states, that the defendant was an assistant overseer, which must mean an assistant overseer appointed under the 59 *G.* 3. *c.* 12. *s.* 7. I also find it alleged that he, as such assistant overseer, had the rate in his possession at the time when an inspection of it was demanded. According to *Spieres* v. *Parker*, we must assume that it was delivered to him for some purpose connected with the duties of his office; and, as those duties can only be some of the duties of the principal overseer, he would have the rate in the same way as the overseer himself. If so, it follows that he was bound to produce it when lawfully demanded, and is liable to a penalty for refusing to do so. If this were otherwise, the parishioners might be altogether deprived

1828.

BEVERLEY *against* EDWARDS.

of the means of obtaining an inspection of the rate. The rule for arresting the judgment must therefore be discharged.

Rule discharged.

The KING *against* The Inhabitants of RAWDEN.

Upon the trial of an appeal, the appellant having proved that the pauper occupied a tenement of 10*l.* per annum, and paid rent and taxes for the same, the respondents, in order to shew that the pauper was not the sole tenant, attempted to prove by parol that the premises were let to the pauper and two other persons; but the witness on cross-examin-

UPON appeal against an order of two justices, whereby *George Clayforth*, his wife and children, were removed from the township of *Idle*, in the West Riding of *Yorkshire*, to the township of *Rawden*, in the same riding; the sessions confirmed the order, subject to the opinion of this Court on the following case: —

The respondents proved a settlement in the appellant's township. The appellants then set up a subsequent settlement gained in the respondents' township by the pauper's having been rated, and having actually paid the rates, in respect of a tenement of the annual value of 10*l.* 10*s.* in that township. It appeared that in *December* 1823 he began to occupy the tenement, which was the property of *Joshua Crompton*, Esq.; that he

1828.

The KING *against* The Inhabitants of RAWDEN.

ment, and who were the tenants? whereupon the appellants' counsel interposed, and asked him, whether there was not an agreement in writing? and on his admitting that there was, they objected that parol evidence of the letting and tenancy could not be received. The court of quarter sessions, however, permitted the question to be put, and the witness stated that he had let the tenement to the pauper, the pauper's father and father-in-law; that they were the tenants, and that they jointly delivered a notice to quit, but that he could not say whether this notice was signed with one or more names. Upon this evidence the court of quarter sessions confirmed the order.

Blackburne and *Dundas* in support of the order of sessions. The evidence was properly received. *Rex* v. *Holy Trinity, Hull* (*a*), shews that the fact of tenancy may be proved by parol evidence, even though it appear that the tenant held by virtue of a written instrument. That case is precisely in point.

Starkie (and *Milner* was with him), contrà, was stopped by the Court.

BAYLEY J. The question in this case is, Whether the evidence of the steward was sufficient to rebut a primâ facie case of tenancy, which was made out by the appellants? In *Rex* v. *The Holy Trinity, Hull* (*a*), the question at the sessions was, Whether the pauper came to settle on a tenement in the character of tenant? The proof was, that he occupied and paid rent. The Court

(*a*) 7 *B.* & *C.* 611.

1828.

The King against The Inhabitants of Rawreth.

thought that was primâ facie evidence that he came to settle in the character of tenant. There can be no doubt that a party may, by keeping out of view a written instrument, make out by parol testimony, a primâ facie case of tenancy; and that it then lies on the opposite party to rebut the primâ facie case so made out. Here a primâ facie case was made out by the appellants. The respondents attempted to vary that case by proving that in fact the premises were let to the pauper jointly with two others; but that letting was by a written instrument. It is quite clear that it could be proved only by the production of the written instrument.

LITTLEDALE J. *Robinson* was called to prove who were the tenants. He was asked to whom he let them: he said, he let them by a written instrument. Parol evidence was not admissible to prove that fact, for that would be to let in parol proof of the contents of the written instrument. This case is perfectly different from the case of *Rex* v. *The Holy Trinity, Hull.* There the tenancy was proved by occupation and payment of rent. That was primâ facie evidence of tenancy. Here the parol evidence was adduced to negative the presumption

1828.

The KING *against* The Inhabitants of CROWLAND, in the Parts of HOLLAND in the County of LINCOLN.

By an act of parliament, passed for draining certain fen-lands, 5000 acres of the said fen-lands were vested in certain trustees as a recompence to the undertakers; and it was enacted, that all the inhabitants that might be thereafter upon any part of the lands so allotted to the trustees, and were not able to maintain themselves, should be maintained by the said trustees, their heirs, &c., and never become chargeto all or any of the respective parishes wherein such inhabitants should reside: Held, that the lands so vested in the trustees were not thereby made extra-parochial; and that a party, by hiring and service on those lands, gained a settlement either in the parish where that part of the allotted lands where the service was performed was situate, or in the allotted lands themselves, which, for this purpose, were to be considered an incorporated district.

UPON an appeal against an order of two justices, whereby *Ruth Reed* and her two legitimate children were removed from the parish of *Spalding*, in the parts of *Holland* and county of *Lincoln*, to the parish of *Crowland*, in the same parts and county; the sessions confirmed the order, subject to the opinion of this Court on the following case: —

The respondents (the parish of *Spalding*) having proved that *Reed*, the husband of the pauper, gained a settlement in 1806, by hiring and service in the parish of *Crowland*, the appellants (the parish of *Crowland*), for the purpose of shewing a settlement in *Deeping Fen*, proved that *Reed*, the husband, served under a yearly hiring with one *William Patchett*, of *Deeping Fen*, from 1807 to 1808, and continued that service until 1809, in which latter year he was married to *Ruth*, the pauper; that the said *William Patchett* during the time of such service was resident upon a part of *Deeping Fen*, and which is more particularly mentioned in a certain act of parliament of the 16 & 17 of *Car.* 2., for the draining of certain fens in *Lincolnshire*, as consisting of 5000 acres, and described in the said act of parliament as being set apart for an additional recompence to certain trustees

1828.

The KING *against* The Inhabitants of CROWLAND.

therein named, over and above a third part of the said fens before assigned to one *Thomas Lovell*, and vested under the provisions of the said act of parliament in the said trustees therein mentioned, their heirs and assigns, in consideration of certain burthens and charges imposed upon the said trustees, their heirs and assigns, by the said act of parliament; that although at the present time there are no overseers for *Deeping Fen*, yet, nevertheless, that overseers were appointed for that place at intervals, but not regularly from the year 1790 to the year 1810, since which time no overseers have been appointed; and that until within the last eight or nine years a workhouse was kept and maintained in the said *Deeping Fen*, for the residence and management of the paupers living in the said fen. Upon this evidence, the court of quarter sessions confirmed the order of removal to *Crowland*, subject to the opinion of this Court upon the above facts, and directed that the said act of parliament should be considered as part of the case (*a*).

M'Dowell

(*a*) The act was entitled "An act for draining of the fen called *Deeping Fen*, and other fens therein mentioned;" and after reciting, "that in the 41 & 42 *Eliz.* one *Thomas Lovell* had undertaken to drain *Deeping Fen* and other fens; that one third part of the fen-lands had been allotted and decreed to him, as a recompence for so doing, by the commissioners of sewers; that the said decree had been ratified and confirmed by an act of parliament passed in the reign of *James* I.; that the said third part was by the said act ordained to be held by *Lovell*, his heirs and assigns; that he entered and became possessed thereof; that by some neglect in maintaining the banks, rivers, and sewers, the fens were returned to their ancient condition," enacted that the said decrees and acts of parliament should be repealed. It then further recited, that the assigns of *Lovell* had not fully effected the works, and alleged for reason, that the allotments were not a sufficient recompence to answer the charge of a more perfect performance of the said work, and enacted that the persons therein named, their heirs and assigns, should be declared to be the undertakers for the draining of the said fens, and every of them, in trust for the purposes therein mentioned.

By

1828.

The KING *against* The Inhabitants of CROWLAND.

M'Dowell in support of the order of sessions. The pauper having once gained a settlement in *Crowland*, was properly removed to that parish, unless he acquired a settlement by hiring and service in *Deeping Fen*. That was an extra-parochial place: it had no overseer since 1790. The pauper, therefore, could not be removed thither. The fourteenth section of the local act throws the burden of maintaining poor persons residing on the 5000 acres on the trustees therein named. It does not appear that the place where the pauper served was a parish, town, or vill. The place, therefore, where he was last legally settled was *Crowland*.

Bolland and *Burnaby* contrà. The facts stated in the case are not sufficient to shew that the place in which the pauper served is extra-parochial. The statute

---

By the fourteenth section it was further enacted, that the said trustees, their heirs and assigns, or the survivor of them, their or any of their tenants, farmers, or groundholders of any part of the said third part, or of the said fen, or of the said 5000 acres, should not have, or at any time thereafter, use, or claim any common of pasture or other commonage of pasturing in any part of the remainder of the said fens, nor any of them, nor in the *North Fen* of *Pinchbeck* and *Spalding*, nor any part thereof, by virtue or pretence of his or their resiance there; but all and every the inhabitants that might thereafter be upon any part of the said third part, or upon any part of the said 5000 acres, and were not able to maintain themselves, should be maintained and kept by the said trustees, their heirs and assigns, and the survivor of them, and never become chargeable in any kind to all or any the respective parishes wherein such inhabitant or inhabitants should reside or dwell; any statute or law to the contrary thereof in anywise notwithstanding."

By a subsequent section, in consideration of the sums expended in and about draining the fens, and of doing the work hereafter to be done, the trustees, their heirs, &c., were to have in fee-simple the third part of all the fens formerly assigned to *Lovell*, &c., as also 3500 acres added and allotted by a decree of sewers, and 1000 acres out of that part of the fens formerly taken in for the queen's improvement, and 5000 acres more, to be taken proportionally out of the fens of *Kesteven* and *Holland*, next adjoining to the 3500 acres, upon the trusts thereinafter mentioned.

says,

1828.

The KING *against* The Inhabitants of CROWLAND.

says, that the inhabitants shall not become a burden to the parishes in which they reside. The presumption, is, that the whole of the 5000 acres were situated in some parishes. The place, therefore, where the pauper served must have been in some one of those parishes; and, if that be so, he gained a settlement in that parish. In *Rex* v. *Saighton on the Hill* (*a*), *Gloverstone*, which was the last place in which the pauper had been legally settled, had, at the time when the order of removal was made, ceased altogether to be a township capable of maintaining its own poor, and yet it was held that the pauper could not be removed from a third parish to *Saighton on the Hill*, where he was settled, before he gained a settlement in *Gloverstone*. Here *Crowland* was not the last place where the pauper was legally settled. He gained a settlement either in the parish in which the part of *Deeping Fen*, in which he served, was situate, or, if that was a vill or township maintaining its own poor, then in that vill or township. It is true that there had not been any overseer appointed for several years. But if it be a vill or township, so as to admit of overseers, the parish of *Spalding* might have applied to the magistrates to appoint them, and then made their order. The place where the hiring and service were had and performed, was either part of some one of the parishes referred to in the fourteenth section, or was a vill or township capable of maintaining its own poor, and in either case the settlement in *Crowland* was superseded.

BAYLEY J. It seems to me that in this case the removal to *Crowland* cannot be supported. It appears

(*a*) 2 *B.* & *A.* 162.

that

1828.

The KING *against* The Inhabitants of CROWLAND.

that the pauper, who was residing in *Spalding*, had acquired a settlement in *Crowland*. But if *Crowland* was not bound to maintain him, the order of removal is bad. There is nothing in the act of parliament to shew that *Deeping Fen* is extra-parochial; and the presumption is, that, before the enclosure, it was in some parish. The provision relied upon in support of the order of sessions, is "that all and every the inhabitants that may hereafter be upon any part of the said third part, or upon any part of the said 5000 acres, and are not able to maintain themselves, shall be maintained and kept by the trustees, &c., and never become chargeable in any kind to all or any the respective parishes wherein such inhabitant or inhabitants shall reside or dwell." The fair construction of that clause seems to me to be, that if a party does or has done in the 5000 acres an act which would give him a settlement in a parish, he shall be no longer maintained by the parish, but that the obligation of maintaining him is cast on the trustees. The land allotted is made, for this purpose, an incorporated district. The true construction of the clause is, not that it prevents a settlement from being obtained, nor that it prevents a person from doing that which will supersede a former settlement gained elsewhere, but that the burden of maintaining the poor, instead of being thrown on the whole parish, is thrown on that particular part. I am of opinion, that in this case the order of removal to *Crowland* was bad, because a settlement was obtained in *Deeping Fen*.

LITTLEDALE J. Generally speaking, every place is to be deemed part of a parish until the contrary be shewn. It ought, therefore, to be shewn, from the words of this act,

1828.

The King against The Inhabitants of Crowland.

act, that the 5000 acres are not
not being shewn, they must be ta
If so, then the pauper gained a
of which the part of the 5000
vice was performed was parc
Crowland was thereby supers
be different if the 5000 acres
place; because, in that case, a
been gained there, and a paupe
thither. It may be another que
gation on the trustees can be e
however, to say, that the ord
supported.

Parke J. When the facts
very plain case. The questio
of removal from *Spalding* to *Cr*
If the pauper had subsequent
to be maintained in some other
supported. Here it is clear,
right to be maintained by the
of the 5000 acres in which th
was parcel, or by the trustees
liament. It is unnecessary to
or the trustees were bound to
do. It is sufficient, in order to
that the pauper had a right to be
or by the trustees. That being
cannot be supported.

O

1828.

DOE on the demise of THOMPSON and Others *against* CLARK.

A cottage standing in the corner of a meadow (belonging to the lord of a manor), but separated from it and from a high road by a hedge, had been occupied for above twenty years without any payment of rent. The lord then demanded possession, which was reluctantly given, and the occupier was told that if he were allowed to resume possession it would only be during pleasure. He did resume and keep possession for fifteen years more, and never paid any rent: Held, that the possession was not necessarily adverse, but might be presumed to have commenced by permission of the lord.

EJECTMENT by the lessors of the plaintiff, as devisees and mortgagees of *John Blackburn*, deceased, who had been the owner of an estate in the parish of *Bradley*, and lord of the manor of *Bradley*.

At the trial before *Park* J., at the Summer assizes for the county of *Hants* 1828, it appeared that the action was brought to recover possession of a cottage, which stood in the corner of a meadow next adjoining the high road in the village of *Bradley*, in the county of *Hants*. A hedge and high bank separated the cottage from the meadow. There was no waste in the village, but there was waste at the extremity of the manor. The land on both sides of the road belonged to the lessors of the plaintiff. It appeared that the cottage had been occupied first by one *Weston*, fifty-four years ago, and afterwards by one *James Phillips*; the latter occupied it forty years, till his death, at the age of eighty, in 1827, when it was sold by his son to the defendant. One *Holloway*, who had been gamekeeper to *Edward Blackburn* in his manor of *Bradley*, was called as a witness: he proved that in 1813 he went with the Rev. *Henry Blackburn*, who was the clergyman of the parish of *Bradley*, and brother of *E. Blackburn*, the then owner of the estate, to *Phillips*'s house; that *H. Blackburn* told *Phillips* and his wife, that he, on behalf of his brother, had come to take possession of the house, and desired them to get another cottage as soon as they could, as his (*H. Blackburn*'s) brother wished to pull it down. *Phillips*'s wife, in the

presence

1828.

Doe dem. Thompson against Clark.

presence of her husband, said, she had as much rig to be there as Mr. *Blackburn*, for they had nev paid any rent. *H. Blackburn* told them it would better for them to give up quiet possession. T husband said to his wife, "It is of no use making piece of work: we had better go out at once." *Philli* and his wife then went out into the road, without t garden-gate, and were asked for the fastenings or key they said they were in the habit of fastening their hou only in the inside. *Phillips* was then asked if there w not a fastening: he said there was a chain, whic *Holloway* looked for but did not find. *Holloway* the went to his cottage, forty yards off, for a chain, and le *H. Blackburn* and the others in the road. He brougl a chain, put it round the wicket, and locked it. *H. Blac burn* and *Holloway* then went into the house, where the remained a few minutes, and then unlocked and locke the gate. *H. Blackburn* then told *Phillips* and his wif "if he let them in again, it would be during his brother pleasure;" and then delivered the key to *Phillips*. appeared, further, that *Phillips* never paid any rent afte wards. Witnesses were called on the part of the d fendant to impugn the evidence of *Holloway*. T

than by the payment of rent, it was evidence that he held by permission of another. The learned Judge then told the jury to consider whether they believed the evidence of *Holloway;* and, if they did, then, whether *Phillips* did not, in 1813, acknowledge that he occupied the cottage by permission of *E. Blackburn?* if they believed the evidence of *Holloway*, the lessors of the plaintiff were entitled to the verdict. The jury having found for the plaintiff, a rule nisi for a new trial was obtained, against which

Selwyn and *Follett* shewed cause. The case of *Doe* v. *Wilkinson* (*a*) is precisely in point. The defendant there had enclosed a small piece of *waste* land by the side of a public highway, and occupied it for thirty years without paying any rent. At the expiration of that time he paid, on three several occasions, 6*d*. rent; and it was held that that, in the absence of other evidence, was conclusive to shew that the occupation of the defendant began by permission, and entitled the plaintiff to a verdict. In this case the circumstance of *Phillips*, in 1813, having given up the possession to the agent of *Edward Blackburn*, was evidently an acknowledgment that the premises had been occupied by the permission of the owner of the estate.

Merewether Serjt. and *Greenwood* contrà. The authorities undoubtedly establish that where the facts are such as to shew that the relation of landlord and tenant exists between the parties, the possession is not adverse. In *Doe* v. *Wilkinson* (*a*) the house was built upon the waste. The defendant had occupied during thirty years, but

(*a*) 5 *B.* & *C.* 413.

during

1828.

Doe dem. Thompson against Clark.

during that time no rent was paid. It was afterwards demanded and paid on three several occasions. The payment of rent was an acknowledgment that the defendant held as tenant to the person to whom he paid rent. That was conclusive evidence to shew that the commencement of the occupation was by the permission of the person to whom he paid the rent. In this case no rent was ever paid by the defendant; and there was no proof that the cottage was built on the waste of the manor. The plaintiffs produced no title-deeds to shew that the land on which the cottage was built was the property of *Blackburn*. It appeared that *Weston* occupied fifty-four years ago; *Phillips* succeeded him, and continued in possession forty-two years. There was no interruption of the possession except for a few minutes. [*Bayley* J. *H. Blackburn*, in 1813, came to the cottage, and, on behalf of his brother, demanded possession, and *Phillips* then reluctantly gave up the possession.] That was not a recognition by *Phillips* that he held as tenant of *Blackburn*; and no evidence of *Blackburn*'s title was given. Unless the Court come to the conclusion that in 1813 *Phillips* intended to admit that the cottage was the property of *Blackburn*, there is no pretence for saying that the latter is entitled to recover.

Bayley J. I think that the rule for a new trial ought to be discharged. There was no evidence to shew under what circumstances the cottage was built. It may have been built by, and afterwards occupied adversely to the former lord of the manor; or it may have been built, and afterwards occupied by *Phillips*, by the permission of the lord. There must be an adverse possession for twenty years to give title. *Phillips* was eighty years of age when he died; he probably knew

under

1828.

DOE dem. THOMPSON against CLARK.

under what circumstances he occupied the cottage, and whether he lived there by the permission of *Blackburn*. Now *Phillips*, while living there in 1813, did an act which was evidence of an acknowledgment by him that he occupied by the permission of the then owner of the estate. The question is, Whether the jury were warranted in concluding from that act, that he did occupy by such permission? It appeared that *E. Blackburn*, under whom the lessors of the plaintiff derived title, then claimed the cottage, and that his claim was reluctantly acquiesced in by *Phillips* and his wife, for they surrendered the possession to him. *H. Blackburn* then told *Phillips* that he should come there in future only by the permission of his brother *E. Blackburn*, and *Phillips* was let into possession on those terms. It was a question for the jury, under those circumstances, to say, whether he remained in the cottage by adverse title, or by the permission of *Blackburn*. There certainly was not in this case any payment of rent, the case, therefore, may not be so strong as that of *Doe* v. *Wilkinson* (*a*). But there was a case for the consideration of the jury. If *Phillips*, in 1813, had refused to give up possession, and an ejectment had been brought, it is possible that the then owner of the estate might have been able to prove by witnesses that *Weston* and *Phillips* came into the possession of, and occupied the cottage by permission. I cannot say the jury came to a wrong conclusion, and, therefore, think that the verdict ought not to be disturbed. This rule must, therefore, be discharged.

LITTLEDALE and PARKE Js. concurred.

Rule discharged.

(*a*) 3 *B.* & *C.* 413.

1828.

MORLAND and Another, Assignees of DICKINS and WARRICK, Bankrupts, *against* PELLATT.

Judgment was entered up on a warrant of attorney given by two joint-traders, and a fi. fa. issued, returnable on the 2d of *May*. On the 1st of that month the sheriff's officer received from the defendants the money directed to be levied. On the 2d of *May* one of them committed an act of bankruptcy, and the other on the 5th. On the 11th a commission of bankrupt issued, and on the 19th the sheriff paid over the money to the execution-creditor. In an action by the assignees: Held, that he was entitled to retain it, not being creditor having a security at the time of the bankruptcy.

ASSUMPSIT for money had and received. Plea, the general issue. At the trial before *Park* J. at the *Devonshire* Summer assizes 1828, it appeared that in *August* 1826, the bankrupts were indebted to the defendant in the sum of 218*l.*, for which he caused them to be arrested. They, thereupon, gave him a warrant of attorney for the amount, which was duly filed, and judgment was entered up on the 5th of *March* 1827, and a fi. fa. issued against the bankrupts, returnable on the 2d of *May*. The goods of the bankrupts were seized on the 7th of *March*, but not sold, they making payments to the officer of the sheriff from time to time; and on the 1st of *May* they paid him the balance of the sum directed to be levied. On the 2d of *May* the officer paid over the money to the under-sheriff, but he refused to pay it to the defendant *Pellatt* without an indemnity. On the 11th of *May* an indemnity was given, and on the 19th the money was paid over. An act of bankruptcy was committed by *Warwick* on the 2d of *May*, and by *Dickins* on the 5th. On the 12th a commission of bankrupt was issued against them, under which the plaintiffs were duly chosen assignees. The learned Judge thought, that, under these circumstances, the plaintiffs were entitled to recover by virtue of the 6 *G.* 4. *c.* 16. *s.* 108., inasmuch as the money was not paid over to the defendant until after the bankruptcy of *Warwick* and *Dickins*. The plaintiffs, under this direction, having

ing obtained a verdict, a rule nisi for a new trial was granted in *Michaelmas* term, against which

Rogers (with whom was *Wilde* Serjt.) shewed cause. According to the decision in *Notley* v. *Buck* (*a*), the plaintiffs were entitled to recover. The money was not paid over by the sheriff until the 19th of *May*; but before that time a commission had issued against *Warwick* and *Dickins*; the sheriff, therefore, had no right to pay over the money, and the present defendant, having received money which belongs to the estate of the bankrupts, is liable to an action for money had and received to the use of the assignees. [*Littledale* J. When the sheriff received the money, he became liable to an action for money had and received by the plaintiff in that suit.] In *Notley* v. *Buck* the seizure was before the bankruptcy, and thereby the property was changed, *Clerk* v. *Withers* (*b*), 2 *Bac. Abr. Exec.* (M), and yet the sheriff was held liable to the assignees. [*Bayley* J. The property is not changed by the seizure, but the sale.] Then it is in the power of the sheriff, by selling or abstaining from doing so, to give the property to either party at his pleasure. But notwithstanding the seizure and sale, the present defendant continued a creditor of the bankrupts. In *Dalton's Sheriff*, 179., it is said, "If the sheriff upon a fi. fa. shall execute the writ, and levy the debt, but shall neither return the writ, nor pay the money to the plaintiff, yet the first levying of the debt was lawful, &c. Secondly, the plaintiff may have a new execution against the defendant, and the defendant is left to his action against the sheriff." But

(*a*) 8 *B. & C.* 160. (*b*) 1 *Salk.* 322.

1828.

MORLAND against PELLATT.

suppose the present defendar
the money, had sued the sher
suggested, he could not have
through the medium of the ju
he would, therefore, have beer
execution, which is contrary t
statute 6 *G.* 4. *c.* 16. *s.* 108. I
fendant could not have recovere
had no right to pay it him, a
standing such payment, belong
bankrupt.

C. F. Williams and *Mereweth*
money directed to be levied w
the 1st of *May*, and by him t
As soon as the payment was m
money had and received to th
that suit, *Dale* v. *Birch* (*a*). [
after a return had been made.]
turnable on the 2d of *May*, be
an act of bankruptcy. The
money was then complete, and
claim upon the bankrupt. Th
to be distinguished from *Wymer*

1828.

MORLAND against PELLATT.

he comes within the clause in question. If, however, he was not then a creditor, but something had intervened which destroyed the debt, I think that the statute is inapplicable. Now the plaintiffs sue under a joint commission, and must make out a title as assignees of both the bankrupts, existing at the time to which they must refer. Their title was not complete until the 5th of *May*, and before that time the writ issued by *Pellatt* was returnable, and the sheriff had received under it the whole sum necessary to satisfy the debt. It is said that the sheriff was bound to keep the money until the return of the writ. We need not decide that, for here it was the duty of the sheriff to bring the money into court on the 2d of *May*, to be paid to the execution creditor. He did not do so; but his neglect of duty cannot vary the rights of the parties; and if he had done his duty *Pellatt* would clearly on that day have ceased to be a creditor of the bankrupts. But without any actual payment of the money to the creditor, I think that the seizure of the debtor's goods, and the conversion of them into money, extinguishes the debt. The old cases say that a levy under a fieri facias discharges the original debt. The only cases since the statute in question are *Wymer* v. *Kemble*, and *Notley* v. *Buck*. In the former, the goods of the debtor had been seized under a fieri facias, and delivered to the creditor under a bill of sale by the sheriff; then a bankruptcy followed, and it was held that he had ceased to be a creditor. *Notley* v. *Buck* was different; there the sheriff had made a seizure before the act of bankruptcy, but the goods remained in his hands unsold at the time of the bankruptcy, and it was held that the sheriff could not pay over to the creditor

1828.

MORLAND against PELLATT.

money received by him after the bankruptcy. After seizure, and before sale, the sheriff has a special property in the goods, but the debtor has the general property; up to that time, therefore, the debt is not extinguished, and the judgment creditor has a security for his debt. But after sale, or payment of the money, the sheriff becomes the debtor, and the original debt is extinguished. In this case, therefore, I am of opinion that the defendant was not a creditor at the time of the bankruptcy, and consequently was not within the statute. He has then a right to retain the money paid to him by the sheriff, and the rule for a new trial must be made absolute.

LITTLEDALE J. I think the defendant was entitled to have a verdict in his favour. But for the proviso in the 108th section there could have been no doubt, for the seizure was before the bankruptcy; and as between a creditor and assignees it has always been held that an execution is executed by seizure, it being an entire thing, which, when once begun, must go on to a conclusion, and cannot be stopped by an act of bankruptcy. But the proviso says that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors. Now that cannot be meant to apply to all persons who ever have been creditors of the bankrupt, and the Court have held it to be confined to creditors having security as mentioned at the beginning of the section. A creditor may be considered as having security by a judgment or a seizure under

1828.

MORLAND *against* PELLATT.

under a fi. fa. But had he security in this case? The act of bankruptcy by one of the partners was not until the 5th of *May*. The whole of the money was paid to the sheriff's officer on the 1st of *May*, before an act of bankruptcy by either partner, and on the 2d it was the duty of the sheriff to return the writ, and pay over the money. From that time *Pellatt* ceased to be a creditor having security. But I am disposed to go still further, and to say that the sheriff was liable to an action for money had and received at the suit of the creditor as soon as it was paid, and before the return of the writ.

PARKE J. I think it clear that the latter part of the 108th section cannot deprive any execution-creditor of his remedy, unless he is a creditor having security at the time of the bankruptcy, and then seeking to avail himself of the execution to the prejudice of other fair creditors. It appears to me that *Pellatt* was not a creditor of the bankrupts at the time of their bankruptcy, for, according to the case of *Perkinson* v. *Gilford* (*a*), at all events on the 2d of *May* the sheriff was substituted for them as the debtor, although it may be doubtful whether an action would lie against him before the return-day of the writ. Here, however, the title of *Pellatt* against the sheriff was perfect before that of the present plaintiffs arose. In *Clerk* v. *Withers*, as reported by Lord *Raymond* (*b*), Lord *Holt* says, that the levy is an answer to an action of debt or scire facias on the judgment, and he refers to *Atkinson* v. *Atkinson* (*c*); but there the money had been paid to the sheriff. That point, therefore, may be somewhat doubt-

(*a*) *Cro. Car.* 539. (*b*) 1072. (*c*) *Cro. Eliz.* 390.

1828.

MORLAND *against* PELLATT.

ful, but where the money has been paid to the sheriff there can be no doubt. *Pellatt*, therefore, at the time of the bankruptcy, was no longer a creditor of the bankrupt. Then is he seeking to avail himself of the execution? It is said that he is, because he cannot sue the sheriff without proving it. Supposing that to be so, he is using it against the sheriff, and not to the prejudice of other fair creditors of the bankrupt. Such an use of the execution is not prohibited. In any view of the case, therefore, the verdict found for the plaintiffs is wrong, and there ought to be a new trial.

Rule absolute.

W. THOMAS *against* WILLIAM COOK.

Where *A.*, at the request of *B.*, entered into a bond with him and *C.* to indemnify *D.* against certain debts due from *C.* and *D.*, and *B.* promised to save *A.* harmless from all loss by reason of the bond: Held, that this promise was binding, although not in writing, and that *A.* might recover from *B.* the whole of the monies which he was compelled to pay by virtue of the bond.

ASSUMPSIT. The declaration stated that on, &c. a certain partnership in trade between one *W. Cook*, since deceased, and one *N. D. Morris*, was dissolved; that it was agreed between *W. Cook*, since deceased, and *Morris*, that the former should take upon himself the payment of certain debts (specified in the declaration); and that it was also agreed that a bond of indemnity, executed by *W. Cook*, since deceased, and two other persons, should be given to *Morris*, to save him harmless from the payment of the said debts. And thereupon afterwards, to wit, on, &c., in consideration that the plaintiff, at the request of the defendant, would, together with the defendant and *W. Cook*, since deceased, execute a bond of indemnity to *Morris* in the sum of 4100*l.* conditioned to save him harmless from the said debts; the defendant undertook and promised the plaintiff that he, the

1828.

THOMAS *against* COOK.

the defendant, would save harmless and indemnify him from all payments, damages, costs, and expences which he (plaintiff) should or might incur, bear, pay, sustain, or be put unto by reason or means of his so executing the said writing obligatory. Averment, that plaintiff was afterwards compelled to pay on account of the said debts the sum of 360*l.*, and that defendant had not indemnified him. The second and third counts were in substance the same. The fourth count alleged, that in consideration that the plaintiff, at the request of the defendant, would, as surety for *W. Cook*, since deceased, together with the said *W. Cook* and the defendant, make and draw a certain bill of exchange for 500*l.* upon certain persons (named), and would indorse and deliver the same to *Morris*, in order that he might negociate the same for his own use, the defendant undertook to indemnify the plaintiff from any loss or damage by reason of his drawing and indorsing the bill. Averment, that plaintiff did draw and indorse the bill in manner aforesaid, and was afterwards by reason thereof compelled to pay it, whereof the defendant had notice, but did not indemnify him. Counts for money lent, paid, had, and received, and on an account stated. Plea, the general issue and statute of limitations. Replication, that defendant promised within six years. At the trial before *Park* J., at the *Hereford Lent* assizes 1828, it appeared that the plaintiff and defendant had executed the bond, and drawn the bill mentioned in the declaration; that the defendant had requested the plaintiff to do so, and promised that he should not be a loser. It was also proved, that on account of payments made by the plaintiff towards the debts specified, and the bill of exchange, a sum of 400*l.* remained due to

him

deficiency of 300*l*. Several ac
by the defendant within six y
the defendant it was contended,
on account of the alteration, an
not recover on the special cou
agreement, the promise there
the debt of a third person, a
could only recover against the
on the count for money paid,
The learned Judge directed th
for the plaintiff for 300*l*., and
to move to reduce it to 150*l*.
pose was obtained in last *Easte*

Taunton and *Chilton* now sh
that the promissory note was
alteration; but although void a
ceived in evidence as a declarat
it that the money was due, *Re*
v. *Maestaer* (*b*). [*Bayley* J.
instrument as a contract, whic
visions of the stamp-act.] Ev
plaintiff is entitled to retain the

1828.

THOMAS *against* COOK.

pay. Such a promise is not within the fourth section of the statute of frauds, and need not be in writing. To be within that clause, the promise must be made to a creditor. Here the plaintiff, at the time when the promise was made, was not a creditor. If one bail procures another person to join him by giving a promise of indemnity, that need not be in writing. In some cases, where there was an original consideration, it was held that a promise, although made to pay a creditor of a third person, need not be in writing, *Williams* v. *Leaper* (*a*), recognized by Lord *Eldon* in *Houlditch* v. *Milne* (*b*), and by Lord *Ellenborough* in *Castling* v. *Aubert* (*c*).

Russell Serjt. and *Curwood* contrà. The declaration itself describes the debts paid by the plaintiff as the debts of *W. Cooke*, deceased, and *Morris* — and the promise alleged to have been made by the defendant is to indemnify the plaintiff if he is called upon to pay those debts; or, in other words, to pay those debts if the original debtors did not. That is expressly within the words of the fourth section of the statute of frauds, which requires all special promises to answer for the debt, default, or miscarriage of another person to be in writing. It is said that the plaintiff was not a creditor at the time when the promise was made; but the cases of *Jones* v. *Cooper* (*d*), and *Matson* v. *Wharam* (*e*) shew that the debt need not exist at the time to be within the statute. [*Bayley* J. This in reality was not a promise to pay the debt of a third person, but to indemnify.] That is true, but it was to indemnify against the debt of a third person.

(*a*) 2 *Wils.* 308. 3 *Burr.* 1886. (*b*) 3 *Esp.* 86.
(*c*) 2 *East*, 325. (*d*) *Cowper*, 227. (*e*) 2 *T. R.* 80.

BAYLEY

1828.

THOMAS *against* COOK.

BAYLEY J. It is provided by the fourth section of the statute of frauds, that "No action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized." Here the bond was given to *Morris* as the creditor; but the promise in question was not made to him. A promise to him would have been to answer for the default of the debtor. But it being necessary for *W. Cooke*, since deceased, to find sureties, the defendant applied to the plaintiff to join him in the bond and bill of exchange, and undertook to save him harmless. A promise to indemnify does not, as it appears to me, fall within either the words or the policy of the statute of frauds; and if so, there was sufficient evidence to entitle the plaintiff to a verdict for 300*l*.

PARKE J. (*a*). This was not a promise to answer for the debt, default, or miscarriage of another person, but an original contract between these parties, that the plaintiff should be indemnified against the bond. If the plaintiff, at the request of the defendant, had paid money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same. The rule for reducing the verdict ought, therefore, to be discharged.

Rule discharged.

(*a*) *Littledale* J. was at the Old Bailey.

1828.

The KING *against* The Inhabitants of MATTISHALL.

Before the execution of an indenture, the master said that the intended apprentice should have better clothes. The apprentice then applied to the parish officers, who agreed to give him 2*l.* on the execution of the indenture, for the purpose of buying clothes, which they did accordingly: Held, that the money paid by the parish-officers was an expense incurred by reason of an indenture of apprenticeship, within the meaning of the 56 *G.* 3. *c.* 139. *s.* 11., and, therefore, that the indenture required the assent of two justices.

UPON an appeal against an order of two justices, whereby *J. Taylor*, and *Anne*, his wife, were removed from the hamlet of *Heigham*, in *Norwich*, in the county of *Norfolk*, to the parish of *Mattishall*, in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case: —

Jeremiah Taylor, on the *Sunday* fortnight before the *Christmas* 1820, when he was living at *Mattishall* with his father and mother, was informed by a person named *Hudson*, that *Joseph Middleton*, who was a blacksmith, living at *Wymondham*, wanted a lad. *J. Taylor* went to *Middleton*'s the next day, when they agreed that *Taylor* should go on the *Tuesday* following, and should stay a month upon liking, and if they liked each other, that he should be apprenticed to him for three years. *Taylor* went to *Middleton*'s on the *Tuesday* following, and continued with him for a month. At the expiration of the month the indenture was executed. It was for three years; it was signed by the master, and attested by the parish officers; but it was not approved of by two justices. *Taylor* served under the indenture for three years, living during all that time with *Middleton*. *Middleton*, before the indenture was executed, said the pauper should have some better clothes, and the pauper thereupon applied to the parish officers of *Mattishall*. The parish officers, who are the attesting witnesses to the indenture, agreed to give him 2*l.* at the execution of the indenture, to buy clothes; and 2*l.* more for the

same

denture of apprenticeship was v
having been approved of by tw
advanced by the parish office
within the meaning of the pr
section of the statute 56 G. 3. c
pense incurred by reason of the
fore, within the very words of t
section. It is also within the m
the legislature, which was, that
tinely advanced money for the
poor children, without becomin
indenture, and thereby rendered
tices unnecessary. The object
that wherever the parish offi
vancing any money, the bindi
the approbation of two justices.

Chitty and *Biggs Andrews* co
not found that the money was
funds, and that fact ought not
Arundel (a) shews, that, befo
c. 139., though the apprentice
parish workhouse at the time
parish officers paid the premi

sary. The 56 *G.* 3. *c.* 139. only applies to cases over which the parish officers have a control in consequence of their providing the premium.

BAYLEY J. It seems to me that the order of sessions is right. The enacting part of the eleventh section of the 56 *G.* 3. *c.* 139. goes beyond the recital. If it had not, I could not have said that the money was paid as a premium. But the master, before the execution of the indenture, requires that the boy should have better clothes, and the pauper then applied to the parish officers, and they supplied him with 2*l.*, and agreed to give him 2*l.* more. It has been said, that it does not appear that the money was paid out of the parish funds. If that was not so, it might easily have been proved. The sessions have found that it was paid by the parish officers. That primâ facie implies, that it was paid by them out of funds belonging to them in that character. We may assume, therefore, that the sessions had premises whereupon to find, that the money was contributed by the parish officers, not out of their private funds, but out of the parish funds. If the fact be so, then we must look to the words of the statute 56 *G.* 3. *c.* 139. *s.* 11. It recites that the salutary provisions of the 43 *Eliz.* are frequently evaded in the binding out *poor* children apprentices, and the premium of apprenticeship, or a part thereof, is clandestinely provided by parish officers, who are thus enabled to bind out such poor children without the sanction of justices of the peace; and then enacts, "that no indenture of apprenticeship, by reason of which *any expense whatever* shall at any time be incurred by the public parochial fund, shall be valid and effectual unless approved of by two justices," &c. Here the money was paid, because the master objected to taking the apprentice

any settlement.

LITTLEDALE J. We must
of the case, that the parish off
out of funds belonging to then
sessions having come to that
within the words of the act of

PARKE J. It is perfectly c
vanced to the pauper was an
public parochial funds, within
part of the eleventh section of t
it was not advanced as a prem
of the recital. I think, also,
the mischief contemplated by
statute 43 *Eliz. c.* 2., the assen
quired in cases where the bi
officers. But if they secretly
part of the premium, (provided
parties,) the assent of the ju
That was the mischief whic
remedy. The statute 56 *G.*
the assent of the justices in a
officers interfere in the bindi

1828.

ROWE *against* BRENTON.

TROVER for a quantity of copper ore. Plea, not guilty. In *Hilary* term, 7 & 8 *G.* 4., the Attorney and Solicitor-General appeared, and suggested that the crown was interested in the result of this cause, and demanded a trial at bar as a matter of right, the Court not having power to grant a writ of nisi prius where the king is a party, or where the matter toucheth the right of the king, without a special warrant from the king or the assent of the king's attorney, 2 *Inst.* 424. *Fitz. N. B.* 241 *a.* tit. *Procedendo.* Upon this ground a trial at bar was granted.

Where the crown is interested the Attorney-General may, as a matter of right, demand a trial at bar.

In this term the cause came on for trial, when, on behalf of the plaintiff, it was proved that he was in possession of certain land called *Lamellan*, or *Nansmellyn*, in the manor of *Tewington*, in *Cornwall*, that he had sunk a shaft there and raised a quantity of copper ore, which was afterwards carried away from the premises by the defendant, who was a shareholder in the *East Crumis* mine, the shaft of which was sunk in land adjoining to the plaintiff's. On the cross-examination of the plaintiff's witness, it appeared that the workings of the *East Crumis* mine extended under the plaintiff's land, and that they were actually working a lode of copper there, when the plaintiff sunk his shaft down to the same lode and brought up the ore in question. The plaintiff's counsel, although aware of the nature of the defence about to be set up, refused in the first instance to give any further evidence of title; and it was thereupon contended

Where in trover for copper ore it was proved that the plaintiff was in possession of land in which he sunk a shaft and raised the ore in question, and the same witness on cross-examination proved that the ore was taken away by a person who had a shaft in an adjoining close, and who was getting the same lode of copper ore under the plaintiff's land when he sunk his shaft: Held, that this was primâ facie evidence of the plaintiff's title to the ore, which must be left to the jury.

1828.

ROWE *against* BRENTON.

tended for the defendant, that the plaintiff had not established even a primâ facie case. He had shewn no title to the land beyond the presumption arising from the mere fact of possession, and although that might, primâ facie, extend to the minerals under the soil as well as to the surface, yet no such presumption could arise when it appeared that the defendant was in possession of and working the lode of copper.

Lord TENTERDEN C. J. We all think that the Court cannot take upon itself to nonsuit the plaintiff. The evidence given must be left to the consideration of the jury.

The *Attorney-General* then opened the case for the defendant, and stated that he claimed the ore in question as lessee under the crown in right of the duchy of *Cornwall.* That the plaintiff's land was a conventionary tenement of the manor of *Tewington*, and that although such tenements were held to the tenants, their heirs and assigns, from seven years to seven years, renewable for ever, they were of a base tenure, and the tenants had no right to the minerals; that the same tenure pervaded the whole of the duchy manors, and that wherever copper had been worked under them, it was by virtue of leases from the Duke of *Cornwall*, or the king, when there was no Duke of *Cornwall.*

In support of this case the following evidence was given.

An extract from Domesday Book, shewing that the king held various manors and possessions in *Cornwall*, three of the manors, *Hellestone*, *Bewingtone* (which was the same as *Tewington*), and *Pennehyle*, being ancient demesne.

Another

1828.

ROWE *against* BRENTON.

Another extract, which stated, that *Rainald* held of Earl *Moreton*, *Treville*, *Tremetone*, and *Calestock*.

A charter of the 15 *H.* 3., whereby he gave and granted to *Richard*, Earl of *Poictou* and *Cornwall*, the whole county of *Cornwall*, with the stannary of *Cornwall*, and *all mines* and other appurtenances of the same county and of the stannary aforesaid; to have and to hold of him, the said king, and of his heirs, to the same earl and his heirs, doing therefore to the said king and his heirs the service of five knights' fees, &c.

A commission issued, 2 *Ed.* 1., to certain escheators, directing them to enquire by good and lawful men, (amongst other things,) how many and what demesne manors the king hath in his hands in each county, as well of ancient demesne of the crown as of escheats and perquisites. Also what manors were wont to be in the hands of the king's predecessors, and who now hold the same, and by what warrant, and from what time, and by whom, and how they have been alienated. The return for the hundred of *Powdreshire* stated, "That the manor of *Tewington* was heretofore ancient demesne of the crown of the lord the king, and King *Henry*, father of the lord the now king, gave the said manor to his brother, Earl of *Cornwall*, and it is worth 20*l.* Also the manors of *Moreste* and *Tibeste*, &c. were escheats of King *Henry*, father of the now king, by the death of *Andrew de Vitri*, and the same King *Henry* gave the said manors to *Richard* his brother, Earl of *Cornwall*, now forty years past and upwards. Also the late *Robert de Cardinan* held in chief of the lord the King *Henry*, father of the lord the now king, seventy-one fees, whereof the lord the Earl of *Cornwall* holds of the same fees *Restormel*, &c. All these are alienated by *Isolda de Cardinan*, and are worth 30*l.* now four years past.

manner. A copy of a coram
was produced, and it appear
the nature of a petition of righ
Valletort, to recover from th
of *Trematon* and *Calestock*. T
in parliament, and was sent
nature of the complaint might
Court sent a request to the
them two inquisitions taken, c
Richard, the other on the d
The Chancellor answered tha
found, but the latter he certi
court, and it is then set out c
admitted to be good seconda
quisition taken in the 29 *E*
record, whereby it appeared
in his demesne as of fee of th
after mentioned as assessionab
of mine of tin, &c. and that in
were free tenants, conventiona

For the plaintiff it was cont
had no right to give evidence
manor except *Tewington*, of w

rights in any of the manors; and as the point was afterwards discussed at length, the arguments upon it in this stage of the proceeding have been omitted.

A grant by *Ed.* 2., in the first year of his reign, to *Piers de Gaveston*, of the whole county of *Cornwall*, with the castles, towns, manors, &c. and also the stannary, and all mines of tin and lead which were of *Edmund*, late Earl of *Cornwall*, in the county aforesaid.

A grant by *Ed.* 2., in the third year of his reign, to *Piers de Gaveston*, and *Margaret* his wife, confirming the former grant.

A grant in the 11 *Ed.* 2. of the same premises to *Isabella*, Queen of *England*, to hold during the king's pleasure.

Charter of the 5 *Ed.* 3., granting to his brother, *John* of *Eltham*, the Earldom of *Cornwall*, and inter alia the seventeen manors in question, which were there enumerated.

Charter of the 11 *Ed.* 3., creating his son *Edward* Duke of *Cornwall*, and granting to him inter alia those seventeen manors, viz. "*Launceston*, *Trematon*, *Tyntagel*, *Restormel*, *Clymneslonde*, *Tybeste*, *Tewington*, *Helleston in Kerrier*, *Moreste*, *Tewarnayle*, (*Tywarnhale*,) *Pengkneth*, *Penlyn*, *Rellaton*, *Elleston in Trighshire*, *Lyskyret*, *Calistock*, *Talskyde*, and *Lostwythiel*, and our prisages and customs of wines, and all the profits of our ports in *Cornwall*, &c.; also our stannary in the same county, together with the coinage of the same stannary, and with all issues and profits therefrom arising, and also with the explees, profits, perquisites of court of stannary, *and mines* in the same county; to have and to hold to him and to the first begotten sons of him and of his heirs kings of *England*, and

as is aforesaid. All which sa
&c. we do by our present chart
annex and unite to the aforesa
the same for ever, so that fro
may at no time be in anywise s
any manner soever given or gra
to any other person or persons
said place; so also that on t
other dukes of the same place
son or sons to whom the said
aforesaid grants is known to bel
the same duchy, with the castl
other things aforesaid, shall re
kings of *England*, to be retaine
the same our heirs kings of *En*
sons hereditarily to succeed i
England shall appear as is afor
us and our heirs we do grant a
with the appurtenances to be d
be holden as is above expresse
the charter there was the followi
however willeth, that his dear a
de Burghuich William de Cusa
hath granted the issues and re

1828.

ROWE *against* BARNTON.

concerning the perception of the aforesaid issues contrary to the aforesaid grant of the king."

Another charter of the same year, reciting the former, and granting to the Duke of *Cornwall* the return of writs in the places before named.

A third charter of the same year, reciting both the former, and granting and confirming to the Duke all fees in any way belonging to the said castles, manors, &c.

The account of the receiver, *William de Cusance*, for the year 11 *Ed.* 3., was then produced from the king's remembrancer's office, (which was proved to be the proper depository for the minister's accounts of the king and the Duke of *Cornwall*.) It appeared to have been audited and allowed. This account stated, that no issues or profits of the manors, &c. in question, had been received after *May*, because *Edward* Duke of *Cornwall* had then taken seisin of them pursuant to the charter.

On account of the interest which the crown has in the duchy of *Cornwall*, all acts which affect the possessions or revenues of the duchy are to be considered as public acts; and, on this ground, a document purporting to be a caption of seisin taken to the use of the first Duke of *Cornwall* by certain persons assigned by his letters patent to do so, was received in evidence to shew the rights of the Duke.

A document was then produced from the same office, purporting to be a caption of seisin to the use of the Duke of *Cornwall*, by *James* de *Wodestocke* and *William de Monden*, assigned by the letters patent of the Duke, to do the same on *Monday*, *May* 12. 11 *Ed.* 3. For the plaintiff it was objected, that this instrument could not be read in evidence. That it was not a public document, executed under any public authority, but a mere account of something done under a letter of attorney from the Duke of *Cornwall*. The Duke of *Cornwall* was merely a subject, although the highest in the kingdom: the public had no interest in his acts, nor any with respect to the revenues of the dukedom. His acts were, therefore, to be treated as those of any other subject, and consequently this instrument could

document relating to the pro
much as it was the evidence o
by *Ed.* 3. to the Duke of *Corn*

Lord Tenterden C. J. T
jection entirely fails. It has
strument cannot be received
a mere private document, the
wall being only like those
general, that is true. But wi
Cornwall, the case is very di
no Duke of *Cornwall*, the po
revert to the crown. The
public, has an interest in ev
duchy of *Cornwall* and its reve
whether any act affecting th
when there is no Duke of *C*
of *Cornwall* when there is
question is, therefore, a docu
of the public, and must be rec

The caption of seisin of the
then read. It first contained
The first entry was as follo

1828.

ROWE *against* BRENTON.

at the feast of *St. Michael* 14*d.*, and doing suit at the court of the lord duke, from three weeks to three weeks."

The other free tenants were then mentioned in like manner, the fine of tin always being a sum certain. Then followed the free conventionaries. "*Nicholas Wysa* holds of the lord duke, in convention, one messuage, &c. which he took of the lord *John*, late Earl of *Cornwall*, to hold in conventionary from the feast of *St. Michael*, in the 7 *Ed.* 3. to the end of seven years thence next following, not completed. Rendering, therefore, by the year, at the four usual terms, 7*s.* 9*d.*; and at the feast of *St. Michael* a certain rent, called a fine of tin, and doing suit at the lord's court from three weeks to three weeks; and he shall be reeve, decennier, and beadle, when he shall be elected; and shall properly sustain the messuage aforesaid, shall manure the land with the whole stock, not making waste nor destruction; and when he shall die the lord shall have in the name of a heriot the beast which shall be of the greatest price, and he shall have nothing of his other chattels. And he hath done fealty, and claims to hold the tenements aforesaid, in free conventionary, by the aforesaid services, during the term aforesaid." After several other free conventionaries, there was "*Philip de Nansmellyn* holds of the lord duke one messuage eleven acres of land *English*, in half an acre of land *Cornish* in *Nansmellyn*, which he took of the aforesaid earl, to hold in convention for the time aforesaid, rendering therefore, by the year, at the four usual terms, 11*s.* and a fine of tin, and doing suit and all other services as the aforesaid *Nicholas Wysa*, and hath done fealty, and claimeth to hold those tenements in free convention

1828.

Rowe against Barrington.

vention by the aforesaid services, during the term aforesaid."

Then followed similar entries as to

John de Nansmellyn;

Jordan de Nansmellyn; and

Gregory de Nansmellyn.

"Native conventionaries.

"*Nicholas Pantener*, a native, holds of the lord duke one messuage, &c. in *Tyngaran*, which he before took of the lord *John*, late Earl of *Cornwall*, to hold in native convention from the feast of *St. Michael*, 7 *Ed. 3.* to the end of seven years then next following, not completed; rendering therefore, by the year, at the four usual terms, 8*s.* and doing suit at the lord's court from three weeks to three weeks. And he shall be reeve, decennier, and beadle, when he shall be elected, and shall be taxed at the will of the lord; and when he shall die, the lord shall have all his chattels, and his latest born son whom he shall leave alive shall have his land by a fine to be made with the lord, at the same lord's will. And hath done fealty, and claimeth to hold those tenements by the aforesaid ser-

and he shall not be amoved from the land for his whole life, and he hath done fealty."

At the close of the document there was this entry: "Fines of tin of free conventionaries and natives at the feast of *St. Michael*, worth by the year 20*s*. Also toll of tin of *Tewington* is worth by the year 6*s*."

The caption of seisin of the other manors also contained free tenants, free conventionaries, native conventionaries, and natives of stock.

A minister's account for *Tewington*, 25 *Ed.* 1., was then read, containing an acknowledgment of 4*s*. of *Passchals* of *Nansmellyn*, a conventionary for this *that he may hold his land for the term of ten years as he before held;* this being the first year.

An ancient extent of crown lands found in the proper office, and purporting to have been taken by a steward of the king's lands, and following in its construction the directions of the stat. 4 *Ed.* 1., will be presumed to have been taken under competent authority, although the commission cannot be found.

A document purporting to be an extent of the manor of *Tewington*, taken in the 1 *Ed.* 3., by *Roger de Gildesburgh*, was then produced from the lord treasurer's remembrancer's office. It was strung together with several others. The first (an extent of *Tywarnhale*) was described as being *per sacramentum;* in the title of the others those words were omitted. On the last there was indorsed, "*Roger de Gildesburg*, steward of the lord the king, of the lands of the king which were in *Isabel* Queen of *England* on this side *Trent*, by command of *William de Norwich*, treasurer, &c., delivers here these rolls the 27th of *October*, 5 *Ed.* 3., from the Conquest." Many extents found in that office have similar indorsements. It was proved that the lord treasurer's remembrancer's office is a proper depository for such documents, and that none are received there unless taken by due authority, but that some extents under the crown are deposited elsewhere. The document was not signed, nor did it contain within itself any statement of the authority by which it was taken;

1828.

ROWE against BARTON.

taken; nor was any commission found. But the order in which the different descriptions of property were mentioned pursued the directions of the statute 4 *Ed.* 1.

For the plaintiff it was objected, that this could not be received in evidence, inasmuch as it did not appear either by any commission, or any internal evidence, by whom or under what authority the extent was taken. The indorsement merely explained the manner in which the rolls came into the remembrancer's office, and had no relation to the taking of the extents.

On the other hand it was argued that the statute 4 *Ed.* 1. made it the duty of the king's steward to take extents from time to time, and that the extent in question must have been taken in pursuance of the statute, as the various matters contained in it followed each other in the order set down in the statute. And further, that in the 1 *Ed.* 3. there was good reason for taking an extent of the lands, &c. granted to Queen *Isabel*, inasmuch as that grant expired on the death of *Ed.* 2.

Lord TENTERDEN C. J. I am of opinion that this instrument must be received. It appears that by the statute 4 *Ed.* 1. extents such as this are directed to be made. It appears also that King *Ed.* 2. in the eleventh year of his reign made a grant of the premises in question to Queen *Isabel*, to hold during his pleasure. That grant would expire on his death. Then, in the fifth year of *Ed.* 3. *Gildersburg* (who appears to have taken the extent in the 1 *Ed.* 3.) by command of the treasurer, delivers in the rolls to the office whence they are now produced. They are found in the office where such things are usually deposited; and the only ground that can be urged against the reception of the evidence is,

is, that the extent does not appear to have been taken by any competent authority. But, considering that the extent pursues the directions of the statute, and that it is found in the proper place, it must be presumed that it was duly taken.

BAYLEY J. Considering that this document was found in the proper office, and that it would have been a breach of duty in the person having the custody of that office to admit any extent not duly taken, I think we must, at this distance of time, presume that it was taken under competent authority. The statute 4 *Ed.* 1. says that extents are to be taken, not by whom. I therefore think it was the duty of each steward under the crown to take extents from time to time of the lands under his care.

LITTLEDALE J. I am of the same opinion. If this had been a survey or rental of a private manor it could not have been received. But an act of parliament requires extents to be taken, and in a certain manner. Looking at the exterior of this roll, we find that the document in question is indorsed in the usual manner, and it comes from the proper office. Looking at the internal contents, we find that the person delivering it in was the person who took it, and was, therefore, the proper person to make the return; and that the matters mentioned in it are those of which the statute directs enquiry to be made. After that, there cannot be a doubt that the extent was taken by virtue of a sufficient authority.

PARKE J. It appears to me that this extent precisely follows the directions of the statute. And if a commission

1828.

ROWE against BRENTON.

sion were necessary to give it validity, we might now presume that such a commission once existed, but has been lost; but I have no doubt that it was the duty of the steward to take it without any express directions. The extent was then read; it enumerated,

1st. Free tenants; and, as to them, a fine of tin as in the caption of seisin.

2d. Free conventionaries, but without any fine of tin.

Amongst others, was

"*John de Nansmellyn* holds half an acre of land, and renders annually 8*s.* 6*d.*;" and similar entries as to

Philip of the same;

Jordan of the same; and

Gregory of the same.

3d. Natives and stock.

At the close, "fine of tin of free conventionaries and native is worth by the year 20*s.*"

"*Roger de Yonge* gives for fine to hold the toll of tin in *Tewington* 6*s.*"

The auditor of the duchy of *Cornwall* then produced from the duchy-office a roll called an Assession Roll, which purported to be an account of the acts done by certain assessors in the 7 *Edw.* 3., under a commission to them by *John* Earl of *Cornwall*, which was there recited.

For the plaintiff it was objected, that no evidence having been given to connect the tenants of the several manors with the proceedings of the commissioners, the roll could not be read; whereupon the parliamentary survey was produced, and in that document, as to *Tewington*, it was stated, that *A. B.*, &c. holdeth in free conventionary to him and his heirs for ever, from seven years to seven years, according to the custom of the

the manor, one messuage, &c. At the end of the survey of *Tewington* the customs of the manor were stated; the first of which was, "there ought to be kept, every seventh year, an assession-court for the said manor, unto which all the customary tenants are by their customs bound to repair, there to enter their claim, and new take the several tenements and parts of tenements that they hold: not that their former title to the same doth then determine, it being by them held to them, their heirs and assigns for ever, according to the custom of the manor; but for that thereby divers advantages do or may accrue to the lord." Several instances of such advantages were then stated, and the survey contained a similar custom as to attending the assession-courts in each of the seventeen manors; but with respect to the rights of widows, and the course of descent, the customs were not precisely the same in each manor. After the parliamentary survey, certain documents were produced from the augmentation-office, which appeared to be memorials to the crown from the tenants of several manors in the 9 *Car.* 1. That from *Tewington* was as follows: —"10th *October*, 9 *Car.* 1. Forasmuch as by the course of time this year falleth out to be the assessionable year of the manor aforesaid, parcel of the ancient inheritance of the duchy of *Cornwall*, at which assessionable year the tenants of the said manor have anciently used to take their customary tenures to them and their heirs from seven years to seven years, according to their custom, by a commission for that service to certain commissioners specially directed; therefore, the customary tenants of the said manor, whose names are subscribed as well for themselves as the residue of the homage absent, made their repair at his majesty's audit,

held

their tender may be received o
the said duchy for the time
Similar memorials from sever
were read. It was then conc
rolls were admissible.

The commission and assess
then read. The commission,
&c. was as follows:—Where
of our seignory of *Cornwall* h
yet hold in divers manors gr
lands of those parts in conve
same lands certain rents by t
wholly expire at the feast of
as is and ought to be know
forasmuch as we have the pow
to any one, to retake our s
hands, and make thereof our
haps, turn to the injury and
nants, nevertheless we will, f
may henceforth hold by new c
in convention, so that they
true value thereof, in manner
ministers, whom we have sent
may be agreed: Therefore, w

for term of life, lives, or years, according as it shall seem to them for the good of our said tenants, who now hold our same lands, or in their default to others who will give us more, and as shall be most for our profit." The roll then contained a statement that they had assessed the lands within mentioned for seven years, and there were entries applicable to the different manors. For *Tewington* the first entry was "Free conventionaries."

"*Nicholas Wysa* hath taken one messuage, seven acres of land, in one ferling of land, &c." The twenty-ninth entry was, "*Philip* of *Nansmellyn* hath taken one messuage, eleven acres *English* in half an acre *Cornish*, which the same holds in *Nansmellyn*, to hold in convention as above, by rendering therefore by the year 11*s.* at the four terms; thereof of new increase 2*s.* 6*d.*, suit and other services, and he gives to the lord for a fine, &c. and hath done fealty," &c.

John de Nansmellyn,

Jordan de Nansmellyn, and

Gregory de Nansmellyn, also appeared to have taken the tenements which they before held, paying an increased rent of 11*s.* instead of 8*s.* 6*d.*

Several ministers' accounts, corresponding with the rents and fines named in the assession-roll, were then put in; and various other assession-rolls were read, by which it appeared that the free conventionaries always took their lands for seven years, sometimes at an increased, and sometimes at a reduced rent, and they found sureties. In the assession-roll, 9 *H.* 7., it appeared that a condition was imposed that the free conventionary tenants should leave their farms in good repair. In the assession-roll, 16 *H.* 7., the free tenants were mentioned for the first time. Of each of them it

 was

in question, where the paitoin
the ore.

The charter granted by Ki
Cornwall, giving them power t
charters of confirmation, 23 *Edw*
of pardon, 33 *H.* 7., which inst
convocation of tinners, were the
by the convocation as to bound

The enrolments of several le
by the crown when there wa
were read, and tollers were exa
of all tin worked in what was
term is well known throughout
as distinguishing the land of th
from that of the free tenants, wh

The enrolment of a lease
W. III., in the eighth year of his
and to farm let to *Henry Vi*
mines and minerals of whatsoe
found, dug, or acquired in any
lordships, manors, precincts, or
of *Cornwall*, as well opened as
power to dig, &c.; except alw
served all royal mines, and all n

1828.

ROWE against BRENTON.

and all tolls, farms, and other dues to us or the farmers there belonging, &c. by any custom or demise heretofore made. Habendum for thirty-one years, rendering one tenth of the clear profits. Covenant by the lessees not to enter upon any lands in the tenure or possession of any of the tenants of the duchy, or of any person or persons whatsoever, without the consent and permission of the tenants and occupiers of the same lands in that respect before had and obtained.

The enrolment of a similar lease granted by the Duke of *Cornwall* in 1717, upon the surrender of the former, was then produced.

The enrolment of a lease granted by the Duke of *Cornwall* is evidence, in the same manner as if it had been granted by the crown when there is no Duke of *Cornwall*.

For the plaintiff it was objected, that this could not be read until evidence had been given of the loss of the original lease, the enrolment being of a counterpart. It was said, that when the property is in the crown, the enrolment is evidence, because the cnown can only grant by matter of record, but that the same reason does not apply to a lease granted by the Duke of *Cornwall*. In *Kinnersley* v. *Orpe* (*a*), it was said that the act of the officer of the duchy of *Lancaster* was evidence; but that case is very different from the present. There the plaintiff, in order to prove his title as lessee of the duchy, produced the original lease; but that contained a proviso, that it should be void unless enrolled within a certain time; and the plaintiff relied on a memorandum in the margin, signed by the auditor, whereby it appeared to have been enrolled. *Buller* J. said, the act of the officer was evidence of the enrolment; but that it was unnecessary to decide the point, the lease being admitted by the pleadings. That case, therefore, is rather an authority against

(*a*) 1 *Doug* 56.

quently, the lease must be co
the crown. It was decided ve
of the duchy, that the Duke
sessions of the duchy with th
King, because it is never dis
Fitz. Abr. Prerog. pl. 16. T
therefore be admissible to pr
perty, either by the King or th

Lord Tenterden C. J. I
enrolment must be received as
the Duke of *Cornwall* is of a
there is nothing else like it kno
property is vested in the Du
there is such a person, and in
not. Whether there is a D
there is an office called the Du
auditor of the duchy accounts,
for managing the affairs of the
rule of evidence as to their
when the property is in the cr
is in the Duke of *Cornwall*, w
finite confusion. Looking at

granted when there was no Duke of *Cornwall*, would be evidence against the crown at any future time? and on account of the peculiar nature of the dukedom, and the interest which the crown has in the possessions of the dukedom, I think that all the same rules must be applicable to it, whether it be at any particular time vested in a Duke of *Cornwall* or in the King.

BAYLEY J. I cannot, as to this point, make any distinction between the King and the Duke of *Cornwall*. To use the phrase of Lord *Hobart*, "Dux censetur una persona cum rege." Now the King cannot alienate the possessions of the crown but by matter of record; and as the fee of the possessions of the duchy is alternately in the Duke of *Cornwall* and the crown, if the Duke could grant without a record, the crown would be bound without a record. It is, therefore, necessary for the protection, as well of the tenants as the crown, that all grants of duchy property should be by a record. Then there is a regular office and an auditor for managing these matters, whose duty it is to enrol authentic documents only. On these grounds, I think that the enrolment in question must be received as evidence of the lease.

LITTLEDALE J. For the purpose of this question, I think that the King and the Duke of *Cornwall* must be considered as identified. It would be very inconvenient if one rule of evidence should prevail when there is a Duke of *Cornwall*, and another when there is not.

PARKE J. I am of the same opinion, on account of the identity of interest between the Duke of *Cornwall* and the crown. There can be no doubt that the lease

Several sets or under-leas
premises were then put in, w
dig for copper within certain
sideration of certain toll.

A witness was then called,
toll of copper in duchy land
crown, but not in fee land.
he had received toll of cop
Tewington.

Where in each of several manors belonging to the same lord, and part of the same district, it appeared that there was a class of tenants answering the same description, and to whom their tenements were granted by similar words: Held, that evidence of what rights had been enjoyed by those tenants in one manor, might be received to

For the plaintiff it was obj
not to be received of that w
manors. The evidence is no
an incident of tenure or a cus
not be allowed to give eviden
in another manor to affect
shews that the tenure is th
any evidence of custom in
prove a custom in another,
of legal memory were in th
person, and formed a part
custom to be binding must
memorial. In this case it has
is not the same throughout

1828.

ROWE *against* BARNTON.

caption of seisin the free conventionary tenants in *Tewington* are said to pay a certain fine of tin, and the same appears in the inquisition post mortem *Edmundi*; but this is not said of the conventionary tenants in other manors. So also in the parliamentary survey, although it is stated as to each manor, that there is an assession court holden every seven years, to which the tenants must resort, and that their estates do not then cease, yet it is not stated that in each they hold to them and their heirs for ever, from seven years to seven years, which is stated of the tenants in *Tewington* and *Helleston*. The tenure is, therefore, very different; for in those manors the tenants would, according to that statement, take a freehold in interest, but not in the others. In order to get rid of this difficulty, and shew the tenure the same, the surrenders and admittances in the different manors should have been produced. According to the opinion of *Fortescue* J. in Duke of *Somerset* v. *France* (*a*), the evidence of things done in other manors cannot be given in evidence to affect the manor where the dispute arises, unless the tenure be the same. At first he was the only member of the court who thought the evidence admissible, even under those circumstances; but *Raymond* C. J. and *Reynolds* J. consented to receive the evidence, upon the assurance that it had been done upon the Northern circuit, and not because they were convinced of the propriety of it. Now it is somewhat remarkable, that in a subsequent case of *Lowther* v. *Raw* (*b*), *Fortescue* J. rejected such evidence; but the judgment was reversed on the authority of *Somerset* v. *France*. All the subsequent cases on the point have

(*a*) 1 *Str.* 662. (*b*) *Fort.* 41.

must mean, that the tenants o
tenure. In the present case th
proved to be the same. Agai
Lord *Ellenborough* assumed that
which the evidence applied ori
person, who had granted it o
certain rights. Here it has be
documentary evidence, that al
originally belong to one perso
manors must, therefore, have d
different persons; and there is
sumption upon which the Cou
v. *White*. The evidence in qu
received to prove an incident o
it be admitted to prove a custom
Fortescue J., although he thoug
sible to shew the quality of the
there was a great difference bet
it to prove a custom. No cust
it has existed from time imme
no common custom can affect
before that time they were in
person, which has been disprov

similarly situated, have not a customary estate, but a mere conventionary estate as leaseholders. No custom can attach to an estate of that nature; and the defendant ought not to be allowed, for one purpose, to treat them as conventionary tenants, and for another, as customary tenants.

Arguments for the defendant. The evidence tendered is not evidence to prove a custom, but to prove what interest the lord has in those lands which in these seventeen manors have been granted out to the conventionary tenants. Custom and tenure are very different things. The tenure must first be established, and then the custom shews in what course that tenure shall go. It is very difficult to say what is the tenure of the conventionary tenants in these manors, and that very obscurity is the ground for receiving this evidence. If they were ascertained to be copyholders, or to be leaseholders, the rights arising from such tenure would be easily ascertained; but all that is known of these tenants is that in each of the manors ever since the 7 *Ed.* 3., and perhaps long before, there have been conventionary tenants; that in each there is an assession court holden once in seven years, at which the conventionary tenants come and renew their holdings. In all the manors they take for seven years, although from long usage it cannot now be said that their rights cease at the end of that term. This similarity, affecting all the seventeen manors, is sufficient to shew that they form one district under the same lord, where he has in all probability reserved throughout similar rights to himself in the grants made to the tenants bearing the same description. Evidence of rights exercised by the lord over conventionary tene-

ments

trict. This principle was r
borough in *Rex* v. *Ellis* (*b*), wl
clay's case from *Hale de Ju*
that the evidence as to othe
perly to be considered evide
manor to prove the custom c
prove one and the same custo
of manors. This is consi
Sir *M. Wright* (*c*), who say
nature of fends, the nature c
lie is to be kept in view.

Lord Tenterden C. J.
Court are bound to receive
by the documents which have
and at the time of the crea
called assession courts were c
every seventh year under a
of the soil, desiring certain
manors, which were then all
lands to the best advantage
court, under the same comm
manor; and we find by the

tionaries, as long as the latter class (which now appears to be extinct) continued to exist. In each manor the free conventionary tenants are said to come and take their lands for seven years. If there were no other evidence they would be pure leaseholders; but by the parliamentary survey it appears that certain commissioners were sent down to enquire into the possessions of the duchy, and in every manor these tenants claim substantially the same rights, although with some minute variations as to the descent of their estates or the rights of their widows. They state that they must attend the assession courts and renew their holdings, but that their right does not cease at the expiration of the seven years. Thus if we take the earlier evidence alone they are all leaseholders; if we take the latter, also, the same character (whatever that may be) belongs to them all. It may be very difficult to say precisely what that character is. It is very peculiar, and not known in any other part of the country, but certainly belongs to all those called free conventionaries in this district. Must we not then, in fairness, in order to ascertain what are the relative rights of the lord and these tenants, in one part of this district, enquire what are their rights in another? It appears to me that plain reason and common sense require it, without resorting to decided cases, or nice and subtle distinctions as to whether the matter in dispute be in the nature of tenure or custom. This is not, properly speaking, a question of tenure, nor a question of custom, such as the course of descent attached to the tenure, but a question as to what the lord parted with to those who are called conventionary tenants.

BAYLEY

existing from a very early
time, the terms of whose t
guage that leaves their rig
find in each manor contemp
class of tenants in the same
what was enjoyed under th
order to ascertain what was
It has been the constant pr
by usage. Thus, where a
B., and *C. successive*, usage
word. Now looking at th
the 1 *Ed.* 3. we find free
tioned, but the terms of th
The same observation appl
There, indeed, a fine of tin
silent as to the right to m
language is used with respec
in each of these manors.
that the usage which has p
therefore evidence to explai
there, is evidence to explain
terms as to any other part

1828.

ROWE *against* BRENTON.

PARKE J. was absent during the argument, and gave no opinion.

Several witnesses were then called, who proved the receipt of toll of copper worked in duchy land in other manors.

Answers to interrogatories may be read without producing the interrogatories, if they cannot be found.

The answers of the tenants to certain interrogatories put to them at the assession court, 1 *Eliz.*, were then tendered, and objected to, because the interrogatories were not produced. It was proved that search had been made for them, but they could not be found.

Lord TENTERDEN C. J. We must allow the answers to be read. If there is any obscurity in them for want of the questions that will destroy their effect.

For the plaintiff, evidence was given in reply, that courts leet were holden for the different manors, and court rolls kept; that surrenders and admittances were made from time to time and entered on those rolls; that the admissions to the tenements called conventionary were "to the tenants, their heirs, and assigns for ever, according to the custom of the manor, doing the services and paying the rents accustomed. Fealty done, and pledges for reparations, payment of rents," &c. That these tenants leased for fourteen or twenty-one years without any licence from the lord, and that they cut and sold timber occasionally, but it did not distinctly appear that the lord knew of it. It was also proved, that in several instances where the lessees under the Duke of *Cornwall* attempted to sink shafts in conventionary tenements for the purpose of getting copper ore, the owners of the tenements resisted, and that in

some

1828.

ROWE *against* BRENTON.

some cases the works were discontinued; in others, a consideration was given to the tenants, in order that the works might be allowed to proceed.

Lord TENTERDEN C. J., in summing up, told the jury, that the question in the cause was, whether the owner of a conventionary tenement was entitled to the copper found under it; or, whether it belonged to the Duke of *Cornwall*; and that there was no question here as to the right to enter and dig for it. That in many manors it happened that the lord of the soil was entitled to the minerals, but had no right to enter upon the lands of the copyhold tenants, to search for and obtain those minerals, without the consent of the tenants, and that all the evidence given by the plaintiff as to the interruption of workings might be explained by the right of the tenant to prevent the owner of the minerals from digging for them without his consent. His Lordship then directed the attention of the jury to the documentary and parol evidence, and observed, that even allowing the conventionary tenants to have in their estates the largest interest that they had ever claimed, viz. from seven years to seven years, renewable for ever, that would not give them a right to the minerals; and, although a distinct positive usage for the conventionary tenants to take the minerals might be valid in law, it was incumbent on them to prove it, for otherwise the right would remain in the lord.

Verdict for the defendant.

Brougham, Erskine, Patteson, and Follett, for the plaintiff.

The *Attorney* and *Solicitor General*, Sir *J. Scarlett*, *Harrison, Dampier*, and *Coleridge*, for the defendant.

1828.

DOE on the Demise of ROBY *against* MAISEY(*a*).

In ejectment by mortgagee against mortgagor, it is not necessary to demand possession before action brought. Where the mortgagee suffers the mortgagor to remain in possession of the mortgaged premises, the latter is not tenant at will to the former, but at most tenant by sufferance only; and may be treated either as tenant or trespasser at the election of the mortgagee.

EJECTMENT. At the trial before *Gaselee* J., at the last *Gloucester* Summer assizes, it appeared that the premises had been mortgaged in fee by the defendant to the lessor of the plaintiff, that the mortgage was forfeited, and that the defendant remained in possession. The usual evidence of the mortgage deed was given, but there was no proof of any demand of possession. Upon this it was contended, that the plaintiff ought to be nonsuited; but the learned judge directed a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

Talfourd now moved, accordingly, to enter a nonsuit. He admitted, that the long established practice had been for a mortgagee to recover without proof of any notice; but he contended that the mortgagor, when allowed to remain in possession, was in the situation of tenant at will to the mortgagee, and therefore could not be treated as a trespasser till the determination of the will; and he cited *Partridge* v. *Bere* (*b*), to shew that the relation of landlord and tenant subsisted. But

Lord TENTERDEN C. J. The mortgagor is not in the situation of tenant at all, or at all events, he is not more than tenant at sufferance; but in a peculiar

(*a*) This case was moved early in the term.
(*b*) 5 *B.&. A.* 604.

character,

In actions by original, the judgment relates to the essoign day of the term in which it is signed.

THIS was an action
gave a cognovit. O
of the defendants died.
term, judgment was er
aside this proceeding as

Richards shewed cause
to *Samuel* v. *Evans* (*a*),
relation to the essoign
treated as signed before

Tomlinson contrà. I
judgment relates to the
then it could not be a
son (*b*).

BAYLEY J. I think t
judgment relates to the
so, the proceedings in th

specting the operation of docketed judgments, that in actions by original the judgment refers to the essoign-day.

Rule discharged.

WELLS, Administrator, *against* GURNEY.

Where, by the contrivance of plaintiff's attorney, a party had been arrested on a *Sunday* on criminal process, for the purpose of effecting his arrest on civil process, and he was detained in custody till *Monday*, and then arrested on the civil process, the Court ordered him to be discharged out of custody.

Quære, Whether a party can be arrested a third time for the same cause of action.

A RULE nisi had been obtained for discharging the defendant out of custody, he having been arrested a third time for the same cause of action. Upon cause being shewn, the court referred it to the master to report on the facts. He made the following report:—The action was brought on a bond; and on the 7th *July*, the defendant was arrested the first time, and discharged from custody on the ground that there was no ac etiam to the writ. He was immediately arrested a second time, and discharged by *Bayley* J. on the ground that the first action had not been discontinued. On *Sunday*, the 16th *November*, he was apprehended upon a warrant for an alleged assault upon one *Parlett*, and on the following day taken to *Bow Street*, where he was bailed for the assault, and arrested there again the third time. The defendant in his affidavits suggested, that the charge of assault was fictitious, and a contrivance of *Bozon*, the plaintiff's attorney, to get the defendant to *Bow Street* for the purpose of arresting him. He, however, failed in establishing that the charge was fictitious altogether, but proved that there was a hostile feeling towards him on the part of *Bozon* the attorney, and that the latter and *Parlett* were acting in concert, and that the carrying

not fabricated. An actual
the magistrate, and the de
bail. The warrant was tak
had any communication witl
pose of this cause. It migl
afterwards for the purpose
This case is distinguishabl
there the person arrested
first instance by the plainti
taking was unlawful. In t
was lawful, and was not effec
contrivance be not allowe
seek to elude the service of
of justice will be frequently
if the means used be lawfu
vexatious. [*Parke J.* Is
third arrest for the same c
to be valid?] There is no
such an arrest may be valid
been released from an arres
of form, and the plaintiff ha
conduct, he is entitled to
and in *Kearney* v. *King* (
ground of variance in a for

Campbell (with whom were *F. Pollock* and *Holroyd*), contrà, was stopped by the court.

BAYLEY J. An arrest cannot be made on civil process on a *Sunday*; but very different means may be used to execute civil and criminal process. For the purpose of executing the latter description of process, the outer door may be broken open; while for that of executing the former, it cannot. In this case, the defendant has been a third time arrested; and it is clear that the criminal process was used on the *Sunday* to give the plaintiff an opportunity of making the arrest on the civil process on *Monday*, and by the execution of the criminal process on the *Sunday*, the defendant was taken into custody and detained till *Monday*, and the plaintiff was thereby enabled to arrest him on the civil process on that day. It is said that the plaintiff might lawfully use these means to arrest him; but I think, that as the arrest on civil process would not have been good upon the *Sunday*, the arrest on that process on the *Monday*, effected by means of the previous arrest on the criminal process and detention till the *Monday*, ought not to be allowed. I admit that contrivances must sometimes be used, in order to execute the civil process of courts of justice; but those contrivances ought to be such as may be lawfully used on the execution of civil process, and an arrest by means of criminal process is not a lawful contrivance.

PARKE J. I think it very doubtful whether a plaintiff can, in any case, lawfully arrest his debtor a third time for the same cause of action. The general rule is, that a man shall not be arrested a second time for the

point, I doubt whether the
to warrant a third arrest. E
my brother *Bayley*, I think
absolute.

Rule absolute. T
action if *Bozon*
the costs.

The King *against*

The statute 56 G. 3. c. 139. s. 2. enacts, that in all cases where the residence or establishment of business of the person to whom any child shall be bound, shall be within a different county from that within which the place by the officers whereof such chi and in all other cases where the justices of the peace f the place by the officers whereof such child shall be bo sign the allowance of the indenture by which such c

INDICTMENT for disob

The indictment stated, t
1826, *W. Ryley* was an ov
parish of *Hanbury*, in the c
on the day and year aforesa
were the churchwardens; a
Orme were the overseers of

1828.

The KING *against* SHIPTON.

Hinckley, and *Orme* were, on the day and year last aforesaid, the major part of the churchwardens and overseers of the poor of *Hanbury*, in the said county of *Stafford*; and that the defendant, late of the parish of *Scropton* and *Foston*, in the county of *Derby*, yeoman, before and on the day and year aforesaid was, and during all the times after mentioned, and from thence for the space of one year then next following, continued to be the occupier of certain lands situated in the parish of *Hanbury*, in the county of *Stafford*; and that the place of residence of the defendant, as also the establishment in trade and place of business of the defendant, was during all the time aforesaid at *Scropton*, within the parish of *Scropton* and *Foston* aforesaid, in the county of *Derby* aforesaid, and within the distance of forty miles from the parish of *Hanbury* aforesaid; that *Hinckley* and *Orme*, so being such overseers as aforesaid theretofore, to wit, on, &c. at, &c. with the assent of Sir *O. Mosley*, Bart. and *T. K. Hall*, Esq., *two justices of the peace in and for the county of Stafford*, dwelling near the said parish of *Hanbury*, did see fit and convenient, and did appoint that *Charles Vernon*, aged nine years, a poor child of the parish of *Hanbury*, whose parents were not by the said churchwardens and overseers of the poor thought able to keep and maintain him, should be bound apprentice to the defendant, so being such occupier of land as aforesaid, and having his place of residence and establishment in trade and place of business at *Scropton*, in the parish of *Scropton* and *Foston* aforesaid, and within a reasonable distance and within the distance of forty miles from the parish of *Hanbury* aforesaid, until *Vernon* should accomplish his full age of twenty-one years, according to the statute in that case made and provided; that on the day and year

1828.

The King against Shipton.

aforesaid, at *Hanbury*, in the county of *Stafford*, and before *Vernon* was bound apprentice by the said overseers of the poor of the parish of *Hanbury* to the defendant, he, *Vernon*, was carried before the said Sir *O. Mosley* and *T. K. Hall*, Esq., so being such justices as aforesaid; and that they examined the father and mother of *Vernon*, and enquired into the propriety of binding *Vernon* apprentice to the defendant, to whom it was proposed by the overseers of the said parish of *Hanbury* to bind the said *Vernon*; and that the said Sir *O. Mosley* and *T. K. Hall*, so being such justices, did particularly enquire and consider whether the defendant resided or had his place of business within a reasonable distance of the said parish of *Hanbury*, to which *Vernon* belonged, having regard to the means of communication between *Hanbury* and *Scropton* and *Foston*, where the defendant so resided and had his place of business; and whether there were any circumstances which should make it fit in their judgment that the said child should be placed apprentice at a greater distance; and did also enquire into the circumstances and character of the defendant; and that they, Sir *O. M.* and *T. K. H.*, did upon such examination and enquiry think it proper that *Vernon* should be bound apprentice to the defendant; and that they, Sir *O. M.* and *T. K. H.*, so being such justices, made an order under their hands and seals, bearing date, &c. as aforesaid, whereby they declared that the defendant was a fit person to whom *Vernon* might be bound an apprentice, and thereupon did thereby order that the said overseers of the poor of the said parish of *Hanbury* should be at liberty to bind *Vernon* apprentice accordingly; and that they, Sir *O. M.* and *T. K. H.*, Esq., did afterwards at the parish of *Hanbury*,

1828.

The KING *against* SHIPTON.

Hanbury, in the county of *Stafford*, deliver the said order for binding *Vernon* apprentice to the defendant, to the said overseers of the poor of the said parish of *Hanbury* aforesaid, as the warrant for binding *Vernon* apprentice; that after the making of the order they signed their allowance of the indenture of apprenticeship thereinafter mentioned, for the binding of *Vernon* by the said churchwardens and overseers of the poor of the parish of *Hanbury* to the defendant, before the same had been executed by any of the other parties thereto; that on the 7th of *January* 1826, at *Egginton*, in the county of *Derby*, the indentures were allowed by the said *Sir O. Mosley, Bart., Ashton Nicholas Mosley, and T. K. Hall, Esquires, then and there being three of his majesty's justices of the peace in and for the county of Derby*, and dwelling near to the parish of *Scropton* and *Foston*, in the said county of *Derby*; that before the last-mentioned allowance of the indentures, to wit, on the 2d *January* 1826, due notice was given to the overseers of the parish of *Scropton* and *Foston*, of the intention of the overseers of the said parish of *Hanbury* to bind *Vernon* apprentice within the parish of *S.* and *F.*, and to apply for the said last-mentioned allowance by the said justices; and that the notice was duly proved before Sir *O. Mosley*, *A. N. Mosley*, and *T. K. Hall*, before they signed the indentures; that *Ryley*, so being such churchwarden, and *Hinckley* and *Orme*, so being such overseers as aforesaid, and *Ryley*, *Hinckley*, and *Orme*, so being the major part of such churchwardens and overseers as aforesaid, (to wit, on the 7th of *January*, in the year aforesaid, at *Hanbury*, in the county of *Stafford*,) caused two parts of a certain indenture to be prepared, bearing date the same day and year last aforesaid,

1828.

The KING *against* SHIPTON.

whereby it was witnessed that *Ryley*, as one of such churchwardens of *Hanbury*, and *Hinckley* and *Orme*, as such overseers of *Hanbury*, with the consent of two of his majesty's justices of the peace for the county of *Stafford*, whose names were thereunto subscribed, that is to say, the said Sir *O. Mosley* and *T. K. Hall*, *so being such justices in and for the county of* Stafford, and of the said Sir *O. M.*, *A. N. M.*, and *T. K. Hall*, Esqrs., then being three of his majesty's justices of the peace *in and for the county of* Derby, whose names were thereunto subscribed, and in pursuance of an order in writing thereunto annexed, made by and under the hands and seals of Sir *O. Mosley* and *T. K. Hall*, Esq., justices of the peace of the said county of *Stafford*, in pursuance of the statute mentioned therein, bearing date 2d *January* 1826, had put and placed *Vernon* apprentice to the defendant, of the parish of *Scropton* and *Foston*, in the county of *Derby* aforesaid, with him to dwell and serve from the day of the date of the indenture until twenty-one, &c. &c.; that *Ryley*, so being one of the churchwardens, and *Hinckley* and *Orme*, so being overseers of the poor, and *Ryley*, *Hinckley*, and *Orme*, so being the major part of such churchwardens and overseers of the poor of the parish of *Hanbury*, in the county of *Stafford*, then and there respectively signed and executed one part of the said indenture, which was then and there allowed and confirmed by Sir *O. Mosley*, *A. N. Mosley*, and *T. K. Hall*, so being such justices for the counties of *Stafford* and *Derby* as aforesaid, who did then and there consent to the putting forth *Vernon* apprentice; of all which said several premises the defendant, so being such occupier of lands as aforesaid, and so residing and having his establishment in trade and of business as aforesaid,

afterwards,

1828.

The KING *against* SHIPTON.

afterwards, to wit, on the day and year last aforesaid, at *Scropton* aforesaid, in the county of *Derby*, had notice. The count then stated the tender of the apprentice, together with the indenture so executed and allowed, to the defendant; a request by *Orme*, so being overseer of *Hanbury*, to receive him, and to execute the other part of the indenture, and the defendant's refusal.

The second count stated, that on the 7th of *January* 1826, *Vernon*, a poor child, being settled in the parish of *Hanbury*, in the county of *Stafford*, whose parents were by the churchwardens and overseers of the poor of the last-mentioned parish considered unable to keep and maintain *Vernon*, was, by *Ryley*, *Hinckley*, and *Orme*, the major part of the churchwardens and overseers of the poor of the last-mentioned parish, and by the consent and allowance of Sir *O. M.*, Bart. and *T. K. Hall*, two of his majesty's justices of the peace in and for the county of *Stafford*, and of the said Sir *O. M.*, *A. N. Mosley*, Esq., and *T. K. Hall*, three of his majesty's justices of the peace for the county of *Derby*, by indenture duly executed, duly bound apprentice to the defendant of the parish of *Scropton* and *Foston* in the said county, the defendant then being an occupier of lands in the said parish of *Hanbury*, and having his place of residence and establishment of business at *Scropton*, in the parish of *Foston* and *Scropton* aforesaid, and within forty miles of the parish of *Hanbury* aforesaid, until *Vernon* should attain twenty-one years of age; that the defendant was tendered the apprentice, together with the indenture, and request made to receive him; but that he refused to receive him, or to execute the other part of the indenture, as in the first count. General demurrer.

N. R.

1828.

The KING against SUTTON.

N. R. Clarke in support of the demurrer. The indictment is bad. First, it does not appear that the indenture was allowed by two justices of the county of *Derby* as well as by two justices of the county of *Stafford*. The binding is by the officers of a parish in the county of *Stafford* to a master living in a parish in the county of *Derby*. The statute 56 *G.* 3. *c.* 139. requires that in such case the indenture shall be allowed by two justices of the county in which the binding parish is situate, *as well as* by two justices of the county in which the parish where the apprentice is to serve is situate. These words of themselves import, in true grammatical construction, that in such case the indentures shall be allowed by four distinct justices. It seems, besides, an absurdity to say, that the justices of the county from which the binding takes place shall institute all the enquiries directed by the first section, shall then make an order for the binding, shall sign their allowance of the indentures before they are executed by any of the parties; and that the same two justices shall then, in another character, consider of the propriety of the binding which has taken place in pursuance of their own order, and has been already allowed by them after the fullest enquiry into every circumstance which it would appear ought to influence their judgment; and shall then go through the form which must be admitted to be necessary, of *a second time* signing their allowance to the same indenture. The legislature must have had some object in requiring the concurrence of magistrates of both counties; and it appears by the preamble, that the object of the various regulations was to remedy "*grievances which had arisen from binding poor children apprentices by parish officers*

to

1828.

The KING *against* SHIPTON.

to improper persons residing at a distance from the parishes to which such poor children belong," &c. This regulation as to the justices must, therefore, have been intended to operate as a check upon the system which then prevailed of binding children into other counties far from their homes; but this check will be rendered much less effectual and beneficial if the construction contended for on the other side prevails; and, in almost every case where the binding parish is on the borders of a county, it will be altogether inoperative, as magistrates who reside near the borders of their county are generally put into the commission for the adjoining county, as a convenience in matters of police, without having any property or interest in such county. If it was the intention of the legislature to protect the master's parish from being overburdened with apprentices, it is manifest that such intention would frequently be defeated by the construction contended for by the other side. If it was supposed that the justices of the county in which the master resides would be more likely to know his character than the justices who order the binding, this cannot apply to the justices who order the binding, and afterwards allow it merely because they happen to be in the commission for the other county. It is true, as the statute says nothing about residence, the apparent intention of the legislature may sometimes be defeated under any construction of the statute; but it will be less likely to be defeated, and improper bindings into distant places less liable to take place, if the concurrence of four justices is necessary. If, as appears probable, the two justices mentioned in the second section were intended to act as an appellate jurisdiction from the two magistrates who order the binding, it could

1828.

The KING against SHIPTON.

could never be intended that they should be the same persons. The words of the statute are not merely directory, as the master is prohibited from taking the apprentice (unless bound as the act directs) under a penalty of 10*l.*

Starkie, contrà. There is nothing in the 56 *G.* 3. *c.* 139. *s.* 2., to shew that the legislature intended that the justices of the second county who allow the indentures, shall be different persons from those who allow them in the first. The terms of the clause are satisfied by an allowance by the same justices having jurisdiction in both counties. That section was not intended to create an appellate jurisdiction, or to operate as a check on the justices of the first, but to give the overseers of the place into which the party is bound an opportunity of objecting to the terms; and, secondly, to give jurisdiction to the magistrates who would not otherwise have jurisdiction. The 43 *Eliz.* *c.* 2. *s.* 9. enacts, "that if a parish shall extend itself into more counties than one, or part lie within the liberty of any city and part without, then the justices shall deal and intermeddle only in so much of the parish as lieth within their liberties and not further; and every of them respectively, within their several limits and jurisdictions, is to execute the ordinances before mentioned concerning the nomination of overseers, the consent to binding apprentices," &c. This clause, therefore, would have prevented the justices of one county from intermeddling in another without some express authority. Further, by sect. 1. of that statute, the binding is to be allowed by two justices dwelling in or near the parish or division; and by statute 56 *G.* 3. *c.* 139., enquiry is to be made before allowance of the indentures

indentures by two justices of the county in which the binding parish is situate. But there is no provision in that statute, either in respect of residence or enquiry by the justices of the county in which the apprentice is to serve. The principal object of the legislature, in requiring a second allowance in cases where the child was to be bound in a parish situate within a different jurisdiction, was to give the officers of the latter parish an opportunity of objecting to the binding there; that, in fact, is the original object intimated, and for that purpose notice is to be given to those officers previous to the second allowance. For although the statute is very specific in requiring the justices of the county in which the child resides, to make every possible enquiry as to the propriety of binding him to a person living at a distance, no such enquiry is directed to be made by the two justices previous to the second allowance; and yet it is very remarkable, that if their jurisdiction was intended to be either of an appellate nature, or if it was even meant that they should make original enquiries of a similar description with those which the statute directs to be made previous to the first allowance, such duties should not have been specifically enjoined. If, on account of the distance of the parish to which the child was to be bound, further enquiry had been considered necessary by other justices, the necessity of such second enquiry would, it is reasonable to suppose, have been regulated, not by the difference of jurisdiction, but by distance. Considering, therefore, the reason of requiring such second allowance, there is no ground for supposing that the legislature meant that the indentures should be allowed in the second instance by other and different justices; and, in point of convenience, it might be

Bayley J. The words
s. 2. are, "that every inden
by two justices for the co
the place by the officers o
bound shall be situated, as
or district within which
wherein such child shall b
words, therefore, require
allowed as well by two justi
justices of the other. Th
say that the indenture sha
of each county; but that
two justices of the one as
I cannot assign any good r
jurisdiction in the two coun
sons; but I think it dang
intention of the legislatur
struction is to abide by th
the language used by the
imply that the indenture sh
of the first county, and also
justices of the other county,
words. I think the words,

1828.

The King against Sutton.

legislature. Giving these words, therefore, their fair grammatical construction, I think that the indenture mentioned in this indictment ought to have been allowed by two justices of the county of *Derby*, being different persons from the two justices of the county of *Stafford*, who first allowed it; and that for want of such allowance the indenture is void; and, consequently, that the indictment against the defendant for refusing to receive the apprentice cannot be supported. The judgment of the Court must, therefore, be for the defendant.

LITTLEDALE J. I am of the same opinion. I cannot collect from the statute that it was the intention of the legislature, that the magistrates of the two counties should act as a check upon each other; and I cannot see any reason why the magistrates should be different persons. I see no reason why, when two justices have jurisdiction to consent to the binding of apprentices by one parish to another in the same county, the same justices should not also have jurisdiction to consent to the binding of them in a case where the parishes are in different counties. But it seems to me, nevertheless, that the words of this act of parliament do require that the magistrates of the two counties should be different persons. It enacts, that the indentures shall be allowed as well by two justices for the county or district within which the place by the officers of which such child shall be bound shall be situated, as by two justices for the county or district within which the place shall be situated wherein such child shall be intended to serve. Now, the magistrates of the two counties might be, and, generally speaking, are, two different persons. That being so, giving these words a grammatical construction, they seem

situate.

PARKE J. I think that w
of the act of parliament, to
the two parishes are situate
indenture must be allowed by
being justices of the county
is situate, and the other two
in which the parish wherein
to serve is situate.

1828.

The KING *against* JOHN WINTER, Esq.

An order of justices, for diverting and stopping up a highway, substituted for the old highway a new road, which passed partly over a road, described in the order as a new line of turnpike road. The sessions confirmed the order, subject to a case. This Court quashed the order of sessions, because it did not appear on the face of the order, or of the case, that the public had the same permanent right to pass over the new road as they had to pass along the old one.

Quære, Whether justices can divert a road for carriages and continue it for foot-passengers.

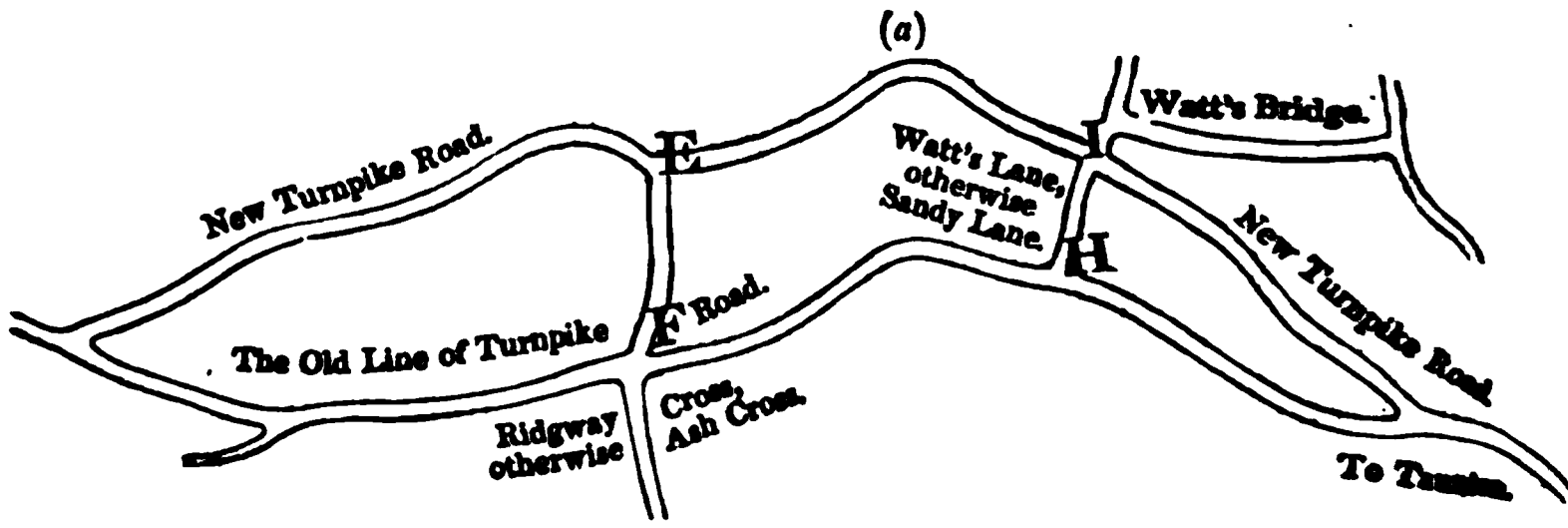
TWO justices of the county of *Somerset* made the following order for diverting and turning a road:— "*Somerset* to wit. We, *A. B.* and *C. D.*, two of the justices of the said county, at a special sessions for the highways, held at, &c., on the 11th of *December* 1827, having, upon view, found that a certain part of a highway within the parish of *Bishop's Lydeard* in the said county, called *Watt's Lane*, otherwise called *Sandy Lane*, lying between the road described in the plan hereunto annexed, as the new line of turnpike road from *Taunton* to *Hartrow* gate, in the parish of *Stogumber*, at or near a certain bridge called *Watt's* bridge, marked on the plan with the letter I., and the public highway heretofore part of the turnpike road from *Taunton* to *Hartrow* gate aforesaid, at or near a certain dwelling-house in the occupation of *James Markes*, marked in the plan with the letter H., for the length of 286 yards, or thereabouts, and particularly described in the plan hereunto annexed, may be diverted and turned so as to make the same more commodious to the public; and having viewed a course proposed for the new highway in lieu thereof, through the lands and grounds of Sir *T. B. Lethbridge* of *Sandhill* park, in the said county, lying between the said new line of turnpike road from *Taunton* to *Hartrow Gate*, at or near a certain turning in the said last-mentioned turnpike road in the parish of *Ashpriors*, in the said county, marked on the plan with the letter

1828.

The KING against WINTER.

E. (*a*), and the said public highway heretofore part of the turnpike road from *Taunton* to *Hartrow* gate, at or near a place called the *Cross* at *Ridgway*, otherwise called *Ash Cross*, in the parish of *Bishop's Lydeard* in the said county, marked on the plan with the letter F., of the length of 466 yards or thereabouts, and of the breadth of sixteen feet or thereabouts, particularly described in the plan hereunto annexed; and having received evidence of the consent of Sir *T. B. Lethbridge*, by writing under his hand and seal, to the said new highway being made through his lands and grounds hereinbefore described, in consideration of the said part of the said *old highway*, hereby ordered to be diverted and turned, being sold, exchanged, and to be vested in him, saving always and reserving a free passage for all persons on foot through the land and soil of the said part of the said old highway hereby ordered to be diverted and turned, according to the ancient usage and custom in that respect, We do hereby order that the said last-mentioned highway be diverted and turned through the lands aforesaid; and when the said new highway shall be made and completed and fit for the reception of travellers, and so certified by two justices of the peace for the county of *Somerset* upon view thereof; and after such certificate shall have been returned to the clerk

(*a*)



d

1828.

The KING *against* WINTER.

of the peace of the said county, and by him enrolled amongst the records of the court of quarter sessions at the general quarter sessions of the peace for the said county, at which this our order shall have been confirmed or enrolled pursuant to the statute in that case made and provided, we do hereby order the said part of the said old highway hereby ordered to be diverted and turned, being of the length of 286 yards or thereabouts, and of the breadth of twelve feet or thereabouts upon a medium, as appears by the said plan, to be stopped up, subject to and saving always, and reserving nevertheless a free passage for all persons on foot through the land and soil of the said part of the said old highway so hereby ordered to be diverted and turned, and stopped up, according to the ancient usage in that respect; and whereas the said Sir *T. B. Lethbridge* hath consented to the making and continuing of the said new highway through his lands, in consideration that the said part of the said old highway hereby ordered to be diverted and turned and stopped up, be sold and exchanged, and vested in him, saving always and reserving nevertheless as aforesaid, we do hereby order that the said lands, grounds, and soil of Sir *T. B. Lethbridge* for the said new highway hereby ordered to be made as aforesaid, be purchased by the sale, disposal, and exchange of the said part of the said old highway hereby ordered to be diverted, turned, and stopped up, and the same to be vested in him, subject to and saving always, and reserving as aforesaid; and we do hereby approve and direct, that the surveyors of the highways of the parish of *Bishop's Lydeard* shall make an agreement with Sir *T. B. Lethbridge*, being the person seised, possessed of, and interested in the said lands, ground, and soil through which the said highway hereby ordered to be

and the same being vested in
ject and saving always, and res
said." The sessions, on ap
subject to the opinion of
order could be legally made
inasmuch as the intended n
not either commence or term
the road to be stopped up, –
points I. and E. being 1154
between the points H. and
also, as the said highway fro
roads included in the act of
"An act to repeal several
several roads leading to the
county of *Somerset*, and se
mentioned, so far as the sai
leading to the said town, and
the same in one act of parlia

C. F. Williams, Cabbell, an
order of sessions. The ord
highway from I. to H. was
new highway from E. to F., a

1828.

The KING against WINTER.

new highway given by the order. It is sufficient that some part or parts (no matter how small) of the highway given by the order should be wholly new. The remainder may consist of an old or pre-existing highway. These positions are established by the case of *De Ponthieu* v. *Pennyfeather and Another* (*a*). It is true, that in that case the diversion commenced with a new highway, and ended in carrying the public to the terminus ad quem by means of a continuation of more than one old highway. But that circumstance is quite immaterial. For if the old highway may be at the end of the new highway, it may be before the commencement of the new. In law, a highway ordered to be diverted from A. to B. is ordered to be diverted from B. to A. Now, whether the diversion be effected by a highway wholly new, or by a highway partly old or pre-existing and partly new, or vice versâ, it is not possible that the new highway should commence or terminate at the same points as the old highway ordered to be diverted and stopped up. Suppose a portion of a highway ordered to be diverted, the extremities of which form lines placed at a right or at any other angle to the side of such highway: in every case the new highway must be placed on one side or other of the remainder of such highway of which the portion has been ordered to be diverted, or of some other highway connected with it; but the new highway must of necessity be placed without the portion ordered to be diverted, or the whole of that portion would not be diverted; therefore, the new highway cannot commence at or terminate in the same points as the old highway ordered to be diverted or stopped up. If so, there is a certain distance, no matter how small, which

(*a*) 5 *Taunt.* 634.

1828.

The King against Wearne.

must exist between the old h
diverted and stopped up, and
that distance must consist of th
highway of which the portion
diverted, or of some other hig
[*Bayley* J. The order of justi
E. F. for I. H. Suppose a p
from I. to F., he must go by
describes the road from I. to E
road. It was probably made so
then there is nothing to secure t
using that road after the expirati
The public have a permanent r
from I. by E. to F. In that po
from F. to E. that right is secure
of magistrates. In the remaini
(though the fact be not stated in
their right is permanently secu
trustees of the *Taunton* turnpik
stituted that road for the old
to F. Where trustees make
it becomes a *permanent* public
able and repairable as such, a
rectatistic of a highway; and

1828.

The KING against WINTER.

prietor of the soil might resume his authority over the surface, and close it against passengers, there is no law by which the original and diverted road could be re-opened; and therefore the public would be left without any road at all. But even if this be not so, still the 3 *G.* 4. *c.* 126. *s.* 4. directs, that all the provisions in that act contained shall extend to all private acts; and therefore, in all cases of diversion since the passing of that act, the rights of the public are regulated by that which is a permanent act; and which, by section 88., directs that when any turnpike road shall be diverted and turned, and the new road shall be made and completed, such new road shall be in lieu of the old road, and shall be deemed and taken to be a common highway; and then if (as it must be) the diversion was made under the General Turnpike Act, it is not necessary that a public act should be referred to in pleading, nor in an order of magistrates. [*Littledale* J. The case, perhaps, may be imperfectly stated. There was formerly an old public highway from I. by H. to F. If the new line of road was made by the order of the commissioners of the turnpike road, under the provisions of the statute 3 *G.* 4. *c.* 126., I should not feel any difficulty; because, by section 88. the new road is to be in lieu of the old road, and to be subject to all the regulations in any act of parliament or otherwise to which the old road was subject, and is to be deemed and taken to be a common highway, and to be repaired and kept as such. The case then would stand thus. The road from I. to E. would be a public highway, as the road from H. to F. was, and the public would have the same rights over the one as the other. If from H. to F. was a permanent highway, and from I. to E. be also a highway, then the old road from I. to H. may be stopped up. *Parke* J. There is nothing to

1828.

[illegible] against [illegible].

shew that the public have a permanent right from I. to E. The order does not shew that to be the case. If it can be shewn, that by act of parliament they have such right, that will be sufficient. It is not pretended that by the local act the public could have any permanent right. If the new line were made a highway under the provisions contained in section 88. of the General Turnpike Act, that ought to have been stated on the face of the order, or of the case.]

The *Solicitor-General* (and *Alderson* and *Erle* were with him), contrà, was stopped by the Court.

Bayley J. It is not necessary to give any decided opinion on the question, whether the magistrates can divert a road partially, so as to vary the line of road for carriages, but continue it for foot-passengers. It may be open to the objection, that the parish will be bound to keep two roads in repair instead of one. On the other point, it seems to me that the order is bad. When magistrates are exercising a specific authority given to them by act of parliament, they ought to shew affirmatively on the face of their order that they have

[redacted]

it a turnpike road for a limited period only, it can subsist as a public road for that period only. It is described as the new line of turnpike road. Generally speaking, a turnpike road is made only for a term of years. We cannot intend, therefore, that the road from I. to E. is a public highway; that the public have permanently a right of passing over it. If a permanent right was given to the public under the local act, that ought to have been shewn. So, if the road had been diverted by the commissioners under the general turnpike act 3 *G.* 4. *c.* 126., and the new line substituted, that ought to have been shewn.

LITTLEDALE J. If the road from I. to E. had become a public highway before the act of parliament passed, the making it a turnpike road merely during the continuance of the act of parliament would not prevent its continuing a public highway. If the road from E. to F. were not a public highway when the turnpike act passed, the justices could not give a more extensive right than the public had before. If the sessions had found under what authority the new turnpike road first became a public road, we might then have known whether part of the new turnpike road could legally be substituted for the old highway. If it was first made a road under the local turnpike act, it would not be sufficient, because in that case the public would not have a permanent right of passage over it. I have considerable difficulty in saying that an old road may be diverted for carriages, and continued for foot passengers; but on that point I give no opinion.

PARKE J. It is sufficient, in order to dispose of this order, to say, that we cannot intend that the justices had

1828.

The KING against WINTER.

had jurisdiction to stop up the road in question. I think that it ought to have been shewn on the face of the order, or of the case, that the public have as good and permanent a right over the whole of the new substituted road as they had over the old. Now as by the 13 *G.* 3. *c.* 78. *s.* 17. justices have power to stop up an old highway only when the *new highway* shall be made, I think it ought to have been shewn on the face of the order, or of the case, that the whole of the new road, substituted for the old one, was a highway over which the public have as good and permanent a right as they had over the old one. By 13 *G.* 3. *c.* 78. *s.* 16. the ground purchased for the new road on payment of the purchase-money, is to become a public highway. The road from I. to H., therefore, would become a highway in this case by virtue of that act. There is nothing to shew that the road from I. to E., which is part of the newly substituted road, has ever become a permanent public highway. It is incumbent on the parties who seek to avail themselves of the powers given by this act of parliament, to shew that the public have a permanent right to pass over the new line of turnpike road from I. and E. Now, that is not stated on the face of the order, nor is it shewn that it was made a public road under the powers given to the commissioners under section 88. of the General Turnpike Act. And assuming that a turnpike road may by user become a public highway, it is not shewn that there has been any user of this road by the public. As it does not, therefore, appear that the magistrates had jurisdiction to stop up the road in question, I think that the order of sessions ought to be quashed.

Order of sessions quashed.

1828.

SYSON and Another *against* JOHNSON and Others.

THIS cause was tried at the Spring assizes for *Lincolnshire* (1827), when a verdict was taken for the plaintiffs by consent, subject to the opinion of this Court on the following case: —

The defendants are liable to the plaintiffs in the sum of 719*l.* 4*s.* 5*d.*, on account of roading and scouring the river *Glen*, provided the defendants are by law bound to road and scour the same. The defendants represent the body of adventurers, trustees or undertakers, who are the proprietors of 10,036 acres of land, being part of the fen commonly called *Deeping Fen*. By virtue of the 16 & 17 *Car.* 2., the trustees for draining *Deeping Fen* are seised of the 10,036 acres, and also of 5000 acres of the residue of the *Fen* to be admeasured, and which had been previously assigned to them by the commissioners

By statute 16 & 17 *Car.* 2., the trustees or adventurers for draining *Deeping Fen* were seised of 10,036 acres of land, and the rates and taxes for completing the drainage of the fen were to be levied on the 10,036 acres. They were called taxable lands. There were 5000 acres called free lands, and the other lands in the fen consisted of common land. The adventurers were at their own costs and charges to keep the river *Glen* with sufficient diking, roading, scouring, and banking. By a subsequent act of the 41 *G.* 3. reciting the former act, and that the works of drainage were insufficient, and that the owners and proprietors of free lands, and persons interested in the commons, notwithstanding their exemption from the costs of making works of drainage, together with the adventurers, being desirous to obtain a better drainage for all the said lands, and more effectually to protect the same from injury by a breach in any of the banks of the river, had agreed that the respective works of drainage thereinafter mentioned should be made, erected, maintained, and supported at the expense of the trusts, proprietors, and persons, in the proportions thereinafter mentioned. By a subsequent clause, the commissioners under that act were thereby required well and sufficiently to enlarge, deepen, and scour out the river, and straighten the course thereof where necessary, and enlarge and straighten the banks of the river in such manner as in the judgment of the commissioners should be requisite; and the costs of executing *all* the said works were to be paid and borne by the several persons then respectively liable to the repairs of such banks, in conjunction with the owners and proprietors interested in the drainage of the said commons, in such proportions as to the commissioners should seem just and equitable, and as they by their award should appoint, and such respective banks, after the commissioners should have completed the same, should from time to time be repaired by such persons as the commissioners should by their award direct: Held, that the adventurers were not, by this statute, released from the obligation imposed on them by the 16 & 17 *Car.* 2. of cleansing and scouring the river *Glen*.

of

1828.

SYSON against JOHNSON.

of sewers. These 5000 acres are further secured to them by the 22 *Car.* 2. By the 16 & 17 *Car.* 2., the rates and taxes for completing the drainage of the fen are to be levied on the owners of 10,036 acres (called taxable lands). The 5000 acres are commonly called the free lands, and are not liable to such taxes. The remainder of the fen, amounting to about 15,000 acres, consists of commons. The river *Glen* commences its course from *Kate*'s bridge, and extends fifteen miles in length to a place called the *Reservoir*, where it unites with the river *Welland*, and runs contiguous to the fens for a distance of six miles. The 16 & 17 *Car.* 2. contains the following provision respecting the banks encompassing the fens; and respecting the diking, roading, scouring, and banking the river: —

"And also the adventurers aforesaid shall for ever hereafter, at their own costs and charges, not only repair, exalt, maintain, and keep, as need shall require, the banks environing and encompassing the said fens, and every of them, but also the bank on the east side of the river *Welland*, from a place in *Crowland*, called *Brotherhouse*, to *Spalding Highbridge*; and also the bank on the north side of the river *Glen*, from *Gutheram Coat* to a place called *Dovehurne*, in *Pinchbeck*; and thereof, and of all and every the said banks above named, shall for ever hereafter save harmless as well the king's majesty, his heirs and successors, as the queen dowager, her tenants and under-tenants, and all other persons, their heirs and assigns, of and for their repairing and amending of their several parts and allotments of the same; but also that the said trustees, their heirs and assigns, and the survivor of them, at their own proper costs

and

1828.

Syson against Johnson.

and charges, shall for ever maintain the rivers of *Glen* and *Welland*, with sufficient dyking, roading, scouring, and banking; viz. the river of *Wellands*, from the outgangs at the east end of *East Deeping*, leading unto the said fens, unto the outfall thereof into the sea, and to preserve and maintain the navigation thereof without imposition or paying any thing whatever for the same, but with liberty to alter and divert the course and channel of the same into any other part or parts of the said fens, before it cometh to the said corner of *Deeping* fen, abutting upon *Hawthorne* bank, from whence, through the said town of *Spalding*, as it now passeth to the sea, it shall not be lawful to divert the course thereof; and with like liberty to divert the said river of *Glen* before it cometh to the place called *Pinchbeck* bars or *Dovekurne*, in *Pinchbeck*, from which place called *Dovekurne*, through the said town, and the town of *Surfleet* as it now passeth to the sea, it shall not be lawful to divert the same or prejudice the navigation thereof, and all manner of drains, sewers, and passages for waters and other waterworks whatsoever, which now are or hereafter shall be made within or without the said fens, for the draining of the said fens, or any of them which shall be necessary to be made or continued, in order to the preserving the said fens from surrounder; and thereof, and of all and every the said rivers, to discharge, exonerate, acquit, and save harmless, as well the king's and the said queen's majesties, his heirs and successors, their tenants and under-tenants, as all other person and persons, their heirs and assigns, of and for the repairing and amending of their several parts and allotments in them, and every of them."

The

1828.

SYSON against JOHNSON.

The adventurers, by the 16 & 17 *Car.* 2., had power granted to them to pull up bridges, weirs, and purprestures throughout the course of the rivers *Glen* and *Welland* that might be too narrow, or otherwise hinder the course or passage of the waters, and they were to repair the ancient bridges and tunnels. By the 22 *Car.* 2. the adventurers may stop persons taking water from the *Glen*, except into the parishes of *Spalding*, *Pinckbeck*, and *Weston*, or into the fen called *Deeping Fen*, and sue them in the courts of *Westminster*. By the 14 *G.* 3. the owners of tunnels on the north-west side of the river *Glen* are to stop up the same after the 1st of *October*; and in their default the adventurers may do so; and they are to build certain bridges, (p. 170.) By the 5 *G.* 3., for draining and improving certain lands (not part of the fen), commonly called the *Black Sluice* Drainage act, the commissioners appointed by the act are to repair the north bank of the *Glen* from *Gutheram Coat* to *Dovehurne*, a distance of four miles, and to exonerate the adventurers of *Deeping Fen* from the repairs, sect. 24, 25. In 10 *G.* 3. *c.* 41., for amending the last act, are contained the following clauses respecting the roading and cleansing of the *Glen*: —

Section 31. "And whereas the north bank of the river *Glen* cannot be maintained and kept in repair as directed by the said former act, unless the waters of the said river have a free passage to the sea: Be it therefore further enacted, that it shall be lawful for the said commissioners, at any meeting convened as therein mentioned, to apply or lay out any sum or sums of money not exceeding 3000*l.*, from and out of the monies to be raised upon the credit of the rates and taxes by this or the said former acts charged on lands in cleansing,

1828.

SYSON against JOHNSON.

ing, scouring, deepening, and widening the river *Glen* from the sluice at the reservoir to *Tongeland*. *s.* 32. Provided nevertheless, that no such sums of money shall be so applied and laid out, unless the undertakers or adventurers of *Deeping Fens* shall apply and lay out an equal sum in scouring, cleansing, deepening, and widening the said river; nor unless the bridges over the said river shall be made and continued of such a width and height as the said commissioners and adventurers shall judge necessary and convenient. *s.* 35. Provided also, that the said river *Glen*, from the sluice at the reservoir to *Pinchbeck* bars, when scoured, cleansed, deepened, and widened as aforesaid, shall for ever thereafter be cleansed, scoured, roaded, and kept in repair by the same persons, parishes, townships, or places who are now by law obliged to scour, road, support, maintain, and keep in repair the same respectively; any thing in this act contained to the contrary in anywise notwithstanding."

In the act of the 41 *G.* 3. are the following recitals and clauses referring to the river *Glen*: — "And whereas the said owners and proprietors of free lands, and persons interested in the said commons lying between the rivers *Welland* and *Glen*, although respectively entitled to be protected and indemnified against the costs and charges of such works of drainage, for draining and preserving their said lands and commons as are required to be done and maintained by the said adventurers under the authority of the said several acts, some or one of them relating to the drainage of *Deeping Fen*; yet, notwithstanding such exemption and protection, the said free land owners and commoners, together with the said adventurers and the commissioners acting under the said

several works of drainage herei
made, erected, maintained, and
expense of the respective trusts, p
and in the proportions hereinaft
directing several works of draina
venturers, and other general wo
rivers *Welland* and *Glen*, and di
be made and supported by an
expense of the owners and propri
lands in *Deeping* fens, and the
between the rivers *Glen* and *Well*
as follows:—" And be it furthe
general commissioners shall, an
rized and required well and suffici
and scour out the said river *G*
thereof where necessary; and en
banks of the said river from th
reservoir to a certain place calle
dimensions and in such manne
the said general commissioners
necessary for the protection of
side thereof, and to admit the
along the said river in times of
as the present main bridges ar

1828.

SYSON against JOHNSON.

the river *Welland* as adjoin to any part of the lands and grounds in the several parishes and places of *Tallington West*, *Deeping Market*, *Deeping*, and *James Deeping*, or any of them; and also of any other stream or streams of water running through the same parishes and places respectively, or through the parish of *Thurlby*, of such sufficient height and strength as they shall think necessary to prevent any such waters from breaking or overflowing the said banks, or any of them; and for that purpose to take earth out of the bed of the said river *Welland* or other streams, or from the lands adjoining thereto respectively (making satisfaction for the same), and to remove the said banks, or any of them, as they in their discretion shall think necessary; and that the costs, charges, and expenses of *executing all the said works* shall be paid and borne by the several persons and parties, bodies politic and corporate, now respectively liable to the repairs of such banks, in conjunction with the owners and proprietors interested in the drainage of the said commons lying between the said rivers *Welland* and *Glen*, in such shares and proportions as to the said general commissioners, under all circumstances, shall seem just and equitable, and as they shall in and by their award, or any writing or writings under their hands, previous to the execution thereof, order and appoint; *and such respective banks, except as hereinafter mentioned, after the said general commissioners have completed the same*, shall be from time to time, and at all times thereafter, repaired, supported, maintained, and upheld of such sufficient height and strength by such person or persons, bodies politic and corporate, and subject to such regulations, orders, directions, and de-

hereby empowered and requir
several persons interested in t
commons lying between the
sons and parties, bodies politi
to the support and reparati
banks for the repair and pre
proportions as the said gene
and by such award or other w

The adventurers always roa
the river until the year 180
passed, and until the same tin
encompassing their own fen,
cepting the bank from *Gu*
previous to the *Black Sluice* I
proved that the adventurers
river between 1806 and 181
sioners under the act of the
period, also occasionally road
missioners, for executing th
dated 25th *March* 1819, awar
said general commissioners
clare, that in observance of

1828.

SYSON *against* JOHNSON.

the same was borne and paid by the several persons and parties, bodies politic and corporate, who were, at the time of passing the said in part recited act, respectively liable to the repairs of such banks, in conjunction with the owners and proprietors interested in the drainage of the said commons lying between the rivers *Welland* and *Glen*; and a rate or assessment for raising the sum of 5000*l.* towards effecting the said works was made, and subsequently thereto, other rates were made for raising further sums for the like purpose from the same persons and parties, and in the like shares and proportions they were respectively made liable by the first rate or assessment, to the extent in the whole (including such first rate or assessment) of 27,500*l.*; and the monies received in payment of all such several rates and assessments have been paid, laid out, and expended, as well in the execution of the said works, as in lowering the tunnel lying under the river *Glen*, by which certain lands, called *Bourne* South Fen Pastures, and *Thurlby* Fen Pastures, were theretofore drained; and we do by this our award declare, that the said works so executed on the said river *Glen*, (except the said tunnel, and also except such parts and proportions of the said banks as are in and by the said recited act directed to be supported and maintained by the *Black Sluice* Drainage commissioners, and the trustees of the *Bourne Eau* Navigation respectively,) shall from time to time, and at all times hereafter, be repaired, supported, maintained, and upheld, by the several persons, bodies politic and corporate, respectively liable thereto, in the several proportions following; *viz.* For every sum of 3971*l.* 5*s.* required from time to time to be raised and levied for the purpose of such repairs, and so in proportion for any greater or

following. The proposition

The question for the op
Whether the liability of th
Fen to road and scour the
16 & 17 *Car.* 2., is taken aw
41 *G.* 3. and the award there

Amos for the plaintiff. Tl
Fen are charged by the statu
road and cleanse the river *Gl*
distinction between the oblig
and to repair the banks is cl
expressed by that statute. T
required to road the river fo
but to repair the banks onl
adventurers received by the s
land, which was an adequa
liability. Then is the liabili
away by the 41 *G.* 3.? T
statute contains two provision
the second of a permanent
temporary provision only, is

1828.

SYSON against JOHNSON.

occasion, where the object was to deepen, as well as to scour the river, and where the adjacent banks would derive material advantage from the process. But this reason would not be sufficient to discharge the adventurers from a statutory liability of cleansing the river from time to time, for which they had received a very adequate consideration. The act of the 10 *G.* 3. shews that in the history of the river it has not been unusual to make parties contributory to the deepening of the river on a particular occasion, without discharging the permanent liability imposed on the adventurers of roading the river. Again, it appears from the acts stated in the case, that the roading of the river is incidental to the maintaining of the navigation, with which the adventurers are charged; but the statute of the 41 *G.* 3. was passed for purposes wholly alien to the maintenance of the navigation of the *Glen*. And by the common law the cleansing of rivers is a charge on the persons to whom the navigation belongs, and not on the owners of the adjacent banks, 13 *Rep.* 12. With respect to the agreement contained in the recital of the act, several persons now sought to be charged were not parties to it; besides its operation is fully exhausted by the works of drainage afterwards in the act directed to be made, and to be executed in the proportions mentioned in the act; whereas nothing is said as to the proportions with which any parties are to be charged for cleansing the river. But in any other view of the agreement, it must be construed reddendo singula singulis, and not that every thing which was directed to be executed at the expense of any individuals, should likewise be supported at the expense of the same individuals. Lastly, the award of the commissioners can-

they are obviously inapplicable.

Fynes Clinton contrà. The
doubtedly threw on the adve
scouring and cleansing the river
ceded that they continue liable
from that obligation by the 41
cites the former acts for drainin
works of drainage were insuffici
of free lands, and persons inte
lying between the two rivers *We*
with the adventurers and the *Bla*
being desirous to obtain a bett
said lands, and more effectuall
from injury by a breach in any c
river head, for those purposes
works of drainage thereinafter d
erected, *maintained, and support*
persons thereinafter mentioned.
shews clearly that the legislatu
for the maintaining and suppor
the works of drainage. The c

1828.

SYSON *against* JOHNSON.

the costs of executing all the said works are to be borne by the persons then liable to the repairs of the banks, in conjunction with the owners interested in the drainage of the commons, in such proportions as the commissioners shall award. The expense, therefore, of scouring the river is to be borne, in this one instance, not by the adventurers only, but by all persons liable to repair the banks, jointly with the owners of the commons. The act then goes on to provide that the *banks*, when completed, shall be repaired by such persons as the commissioners shall direct. It is true that this clause does not in terms provide for the repairing of the other works of drainage; but in order to satisfy the intention of the legislature that all the works of drainage contemplated in the recital should be maintained and supported, the word *banks* must be construed to mean *works*; and the consequence of that will be, that all the works of drainage must be repaired, supported, maintained, and upheld from time to time by the persons liable thereto, in the proportions directed by the commissioners. That is the construction put upon the act by the commissioners in their award. It is said that all the words of the recital are satisfied by the works of drainage thereinafter directed to be made and executed, and the banks thereinafter directed to be maintained and supported; but the recital applies to all the banks; the enactment applies only to the banks completed by the commissioners under that act. The provisions referred to, therefore, do not satisfy the recital. Assuming that there are no express words to exonerate the adventurers from the burthen of cleansing and scouring the river, they are exempted by necessary implication. By the act, the banks may be enlarged

Bayley J. The act of the
acts, and that the then works
ficient, and that the owners and
and persons interested in the co
rivers *Glen* and *Welland*, alth
tected and indemnified against
of drainage, for draining and
and commons, as are require
tained by the adventurers unde
recited) relating to the drainag
withstanding such exemption,
commoners, together with the
missioners acting under the tw
being desirous to obtain a *b*
effectually to protect the sa
several works of drainage th
be made, erected, maintained,
the expense of the respective
persons, and in the proportio
Then we are to look to the
what the works of drainage ar
made, maintained, and support

banks of the river *Welland* as adjoin to any part of the lands and grounds in the parishes and places therein described; and also of any other streams of water running through the same parishes and places, of such sufficient height and strength as they shall think necessary to prevent any such waters from breaking or overflowing the said banks, or any of them; and the costs of executing *all* the said works are to be paid and borne by the several persons and parties *then* respectively liable to the repairs of such banks, in conjunction with the owners and proprietors interested in the drainage of the said commons lying between the rivers *Welland* and *Glen*, in such proportions as the said general commissioners shall, by their award, appoint." That act gives to the commissioners the power of deciding in what proportion the costs of executing *all* the said works shall be borne by the persons therein mentioned. The language of the act is then varied: it goes on to state, "and such respective banks, after the said general commissioners have completed the same, shall be from time to time repaired, supported, and maintained of such sufficient height and strength by such persons, &c. and subject to such regulations as the said general commissioners shall by their award direct." In the early part of this very section, the general commissioners were authorized to enlarge, deepen, and scour out the river *Glen*; but in this part the section gives direction only as to how the *banks* are to be repaired, supported, and maintained. It is silent as to scouring and cleansing the *Glen*. It goes on to say, "and the officer or other person having the direction of the repairs of such banks shall have power, from time to time, to make rates upon the several persons interested in the said *Crowland* and other commons

ference to the works to be execu
and the banks which are to b
thereafter. The expence of ex
to be borne by the persons therei
portion directed by the commis
manent repair of the banks is t
time by the persons therein menti
directed by the commissioners.
the cleansing and scouring the
or for maintaining any other
cannot say that there is clear a
shew that the adventurers ar
charges of cleansing and scour
they were liable by the statute o
words expressly exempting ther
and there is nothing in the act
necessary implication; and not
press words, or by necessary impl
that they continue liable.

LITTLEDALE J. It is conceded
are not released by the act of the
gation to cleanse and scour th
liable. The question is Wheth

turers, and commissioners acting under the two acts of the 5 & 10 G. 3., being desirous to obtain a better drainage for all the lands, had for those purposes, agreed, that the several works of drainage thereinafter directed should be made, erected, maintained, and supported at the expence of the respective trusts, proprietors, and persons, and in the proportions thereinafter mentioned. All that can be inferred from this recital is, that some direction was to be given in a subsequent part of the act, as to the making and maintaining of these works of drainage: it is not to be thence inferred, that those who made, should afterwards maintain them. In the subsequent clause, which contains this direction, there is an important difference between executing and maintaining. That clause enacts, "that the costs of executing *all* the said works of drainage are to be paid by the several persons respectively liable to the repairs of such banks, in conjunction with the owners and proprietors interested in the drainage of the said commons lying between the two rivers, in such proportions as to the said commissioners shall seem just, and as they shall by their award appoint; but the banks, after the said general commissioners have completed the same, are to be from time to time repaired, supported, and maintained by such persons as the said general commissioners shall by their award order and appoint." There is an important difference between the language of the different branches of this clause. In the first part of the clause, the costs of executing *all* the works are directed to be borne by the persons therein mentioned; but, in the second, the expence of repairing *the banks* from time to time, not *of repairing all the works of drainage*, is directed to be borne by such persons and in such proportions as the commissioners shall direct. The introduction of the word *all* shews a manifest intention

and scouring, from time to tim
so, I think that, according to
this act of parliament, the ad
cleanse and scour the river *Gl*

Parke J. The plaintiffs a
the defendants, who represent
be liable to cleanse and sco
statute of the 16 & 17 *Car.* 2.
duty of roading and scourin
statute 10 *G.* 3., which is draw
the 41 *G.* 3., expressly provi
liable to discharge that duty.
that duty, which clearly rested
passing the last-mentioned act,
That act, after reciting the
works of drainage were insuffi
agreed that the several works o
rected to be made, should be
and supported by and at the
thereinafter mentioned, directs
to be done to improve the cond
then provides for payment of t
those works by all the persons

1828.

SYSON *against* JOHNSON.

said, that the recital must controul the enacting clause; but the recital is not inconsistent with the subsequent enactments. It must be construed, reddendo singula singulis. The effect of the statute then will be, "that the costs of the improvements must be borne by the adventurers, the proprietors of the commons and free land; and that the repairs of the banks, when completed, must be borne from time to time by such persons as the commissioners shall direct; but the repairs of the other works of drainage must be borne by the persons who were before liable to make those repairs. There is no permanent provision for the expense of cleansing and scouring the river: the adventurers, before the passing of that act, were bound to bear that expense, and they must, therefore, continue liable to that charge. The plaintiffs are, therefore, entitled to judgment.

Judgment for the plaintiffs.

DOE dem. WARREN *against* AARON BRAY.

An entry in the register-book by the minister of the parish of the baptism of a child, which had taken place before he became minister, or had any connection with the parish, and of which he received information from the parish clerk, is not admissible in evidence, nor is the private memorandum of the fact made by the clerk, who was present at the baptism.

EJECTMENT. At the trial before *Vaughan* B., at the Spring assizes for the county of *Worcester* 1828, the question was, Whether the defendant, *Aaron Bray*, was the legitimate son of his father? On the part of the defendant, among other evidence, the register-book of baptisms of the parish of *Castlemorton*, in the county of *Worcester*, for the year 1776, was produced; and it contained an entry of baptism of *Aaron*, the son of *John Bray*, and *Elizabeth* his wife, on the 6th of *February* 1776. It appeared, on cross-examination of the witness,

that

1828.

Doe dem. Warren against Bray.

that the entry was in the handwriting of the Rev. Dr *Smith*, and that he did not become minister of the parish till the year 1777; that, during the years 1775 and 1776, the then incumbent of the parish was very infirm and that the then clerk, who continued in office for several years afterwards, entered on slips of paper an account of the baptisms, &c.; and his memoranda, which had been preserved, were produced, and there was no doubt that Mr. *Smith* had made from them the entries in the register-book. It was objected, under the circumstances, that neither the register nor the memoranda made by the clerk were admissible in evidence. The learned Judge received them. A verdict having been found for the defendant, a rule nisi for a new trial had been obtained, on the ground, that the evidence ought not to have been received.

Campbell and *R. V. Richards* now shewed cause. The register was properly received in evidence. The clerk, who must have been present at the baptism, made an entry on paper which was afterwards copied into the register-book by the incumbent of the parish. It is true, he was not incumbent at the time when the christ-

1828.

DOE dem. WARREN *against* BRAY.

time of the baptism, was not the minister of the parish. But if the register was falsified, by shewing that the entry was made by Mr. *Smith* after he became minister of the parish, it was set up again as a good register, by shewing the source from which the entry itself was taken. [*Bayley* J. The memoranda would not be evidence. In *Newham* v. *Raithby* (*a*), copies of the register of a dissenting chapel were not allowed to be pleaded in evidence, on the ground that they were not copies of public documents which were in official custody. And if the private memoranda of the clerk not made in the register-book would not be evidence, how can an entry made from them into the register-book be evidence? In the case of *May* v. *May*, (*b*) cited 3 *Burn*, 299., the question arose on the plaintiff's legitimacy; and on his part a general parish register was produced, in which there was an entry of his christening, describing him in the same manner as legitimate children were usually entered. It appeared that the practice was, to make entries in the register once in three weeks, out of a day-book, in which entries were made immediately after the christening on the same morning; and in the case of illegitimate children, to insert in the entry the letters B. B., which were intended to signify "base-born." The defendant's counsel then offered in evidence the day-book from which the other entry was posted, and in which the letters B. B. were inserted, insisting that it was the original entry. But a majority of the judges present, at a trial at bar, were of opinion that such evidence ought not to be received, on the ground that there could not be two registers in the parish, and that the one first produced ought to be taken to be the true register."] In that

(*a*) 1 *Phill.* 15. (*b*) 2 *Str.* 1072.

case

1828.

Doe dem. Warren against Bray.

case the register had been completed; but in th case it is contended by the plaintiff, that the prop register never has been perfected, and if that be s and the memoranda be received in evidence, ther will not be two registers. If the entry in the register book be admissible, it will be sufficient. [*Littledale* J By the 70th canon, 3 *Burn's E. L.* 290., the name of all persons christened are required to be entered in the register-book at the end of every week. *Parke* J. One ground why a register is evidence is, because it is made by a person who has a public duty to perform. Here the register is made up by a person, who, as far as this baptism was concerned, was a perfect stranger to the transaction. He had no connection with the parish at the time when the baptism took place.] Suppose the entry to have been made in the register-book by the clerk during the lifetime of the first incumbent, it surely would have been admissible in evidence? [*Bayley* J. In that case it might be presumed, that the clerk was authorized by the minister to make the entry, and then it would be the act of the minister; but we cannot presume that an entry made after his death was made by his direction.]

1828.

Doe dem. WARREN against BRAY.

person who appeared at that time to have any connection with the parish, — but by one who afterwards became the minister of the parish. It must be taken, therefore, that he made this entry after the death of the minister of the parish who was present at this baptism. He was recording a fact, therefore, not within his own knowledge, but one of which he received information from the clerk. I think, therefore, the register itself clearly ought not to have been received in evidence. But, then, supposing there was no register, it has been said, that the clerk's memoranda were admissible evidence to prove all the facts that could be proved by a register. It was not his duty to make such memoranda: they are mere private entries. *May* v. *May*, to which I referred during the argument, shews that a day-book, from which the entries in a register were made, is not admissible in evidence. The editor of *Burn's Eccl. Law*, after stating that case in vol. iii. p. 293., makes the following observation: — "If, indeed, the entry in the day-book, representing the plaintiff as illegitimate, had been signed by the reputed father or the mother, or made under their direction, such evidence would have been admissible as the *declaration* of a deceased parent on a question of legitimacy; for the declarations of deceased persons, supposed to have been married, (who might themselves be examined, if alive,) are admissible to disprove the fact of marriage (*a*); but if, on the other hand, in the absence of such proof, the entry appeared to be merely a private memorandum, kept for the purpose of assisting the clerk to make up the register (and of that nature it seems here to have been considered), in that case it should not be received as the

(*a*) *Rex* v. *Bramly*, 6 *T. R.* 330.

acts, and that the then w
ficient, and that the owner
and persons interested in t
rivers *Glen* and *Welland*,
tected and indemnified ag
of drainage, for draining
and commons, as are req
tained by the adventurers
recited) relating to the dra
withstanding such exempt
commoners, together with
missioners acting under th
being desirous to obtain
effectually to protect the
several works of drainag
be made, erected, maintai
the expense of the respe
persons, and in the propo
Then we are to look to
what the works of drainag
made, maintained, and sup
sons thereinafter mentione
are required well and su

1828.

SYSON against JOHNSON.

banks of the river *Welland* as adjoin to any part of the lands and grounds in the parishes and places therein described; and also of any other streams of water running through the same parishes and places, of such sufficient height and strength as they shall think necessary to prevent any such waters from breaking or overflowing the said banks, or any of them; and the costs of executing *all* the said works are to be paid and borne by the several persons and parties *then* respectively liable to the repairs of such banks, in conjunction with the owners and proprietors interested in the drainage of the said commons lying between the rivers *Welland* and *Glen*, in such proportions as the said general commissioners shall, by their award, appoint." That act gives to the commissioners the power of deciding in what proportion the costs of executing *all* the said works shall be borne by the persons therein mentioned. The language of the act is then varied: it goes on to state, "and such respective banks, after the said general commissioners have completed the same, shall be from time to time repaired, supported, and maintained of such sufficient height and strength by such persons, &c. and subject to such regulations as the said general commissioners shall by their award direct." In the early part of this very section, the general commissioners were authorized to enlarge, deepen, and scour out the river *Glen*; but in this part the section gives direction only as to how the *banks* are to be repaired, supported, and maintained. It is silent as to scouring and cleansing the *Glen*. It goes on to say, "and the officer or other person having the direction of the repairs of such banks shall have power, from time to time, to make rates upon the several persons interested in the said *Crowland* and other commons

1828.

Syson against Jamieson.

mons lying between the said
now liable to the support and
spective banks, for the repair
in such proportions as the as
shall, by their award, appoint.
that clause, a variation in th
ference to the works to be exe
and the banks which are to
thereafter. The expence of
to be borne by the persons the
portion directed by the comm
manent repair of the banks is
time by the persons therein me
directed by the commissioners.
the cleansing and scouring the
or for maintaining any oth
cannot say that there is clear
shew that the adventurers
charges of cleansing and sco
they were liable by the statute
words expressly exempting th
and there is nothing in the act
necessary implication; and no
press words, or by necessary in

turers, and commissioners acting under the two acts of the 5 & 10 G. 3., being desirous to obtain a better drainage for all the lands, had for those purposes, agreed, that the several works of drainage thereinafter directed should be made, erected, maintained, and supported at the expence of the respective trusts, proprietors, and persons, and in the proportions thereinafter mentioned. All that can be inferred from this recital is, that some direction was to be given in a subsequent part of the act, as to the making and maintaining of these works of drainage: it is not to be thence inferred, that those who made, should afterwards maintain them. In the subsequent clause, which contains this direction, there is an important difference between executing and maintaining. That clause enacts, "that the costs of executing *all* the said works of drainage are to be paid by the several persons respectively liable to the repairs of such banks, in conjunction with the owners and proprietors interested in the drainage of the said commons lying between the two rivers, in such proportions as to the said commissioners shall seem just, and as they shall by their award appoint; but the banks, after the said general commissioners have completed the same, are to be from time to time repaired, supported, and maintained by such persons as the said general commissioners shall by their award order and appoint." There is an important difference between the language of the different branches of this clause. In the first part of the clause, the costs of executing *all* the works are directed to be borne by the persons therein mentioned; but, in the second, the expence of repairing *the banks* from time to time, not *of repairing all the works of drainage*, is directed to be borne by such persons and in such proportions as the commissioners shall direct. The introduction of the word *all* shews a manifest intention

1828.

Sykes against Johnson.

tention to make a distinction between the expence making and maintaining the works of drainage. T legislature provides for the expence of executing all t works of drainage contemplated by the act; but it pr vides only for the expence of repairing, from time time, the banks, but not for the expence of cleansir and scouring, from time to time, the river. That beir so, I think that, according to the true construction this act of parliament, the adventurers remain liable t cleanse and scour the river *Glen*.

Parke J. The plaintiffs are entitled to a verdict, i the defendants, who represent the body of adventurers be liable to cleanse and scour the river *Glen*. Th statute of the 16 & 17 *Car.* 2. imposes upon them th duty of roading and scouring the river *Glen*. Th statute 10 *G.* 3., which is drawn with more caution tha the 41 *G.* 3., expressly provides for their continuin liable to discharge that duty. The question is, Whethe that duty, which clearly rested with them at the time o passing the last-mentioned act, was thereby taken away That act, after reciting the former acts, and that th works of drainage were insufficient, and that it had bee

said, that the recital must controul the enacting clause; but the recital is not inconsistent with the subsequent enactments. It must be construed, reddendo singula singulis. The effect of the statute then will be, "that the costs of the improvements must be borne by the adventurers, the proprietors of the commons and free land; and that the repairs of the banks, when completed, must be borne from time to time by such persons as the commissioners shall direct; but the repairs of the other works of drainage must be borne by the persons who were before liable to make those repairs. There is no permanent provision for the expense of cleansing and scouring the river: the adventurers, before the passing of that act, were bound to bear that expense, and they must, therefore, continue liable to that charge. The plaintiffs are, therefore, entitled to judgment.

Judgment for the plaintiffs.

DOE dem. WARREN *against* AARON BRAY.

An entry in the register-book by the minister of the parish of the baptism of a child, which had taken place before he became minister, or had any connection with the parish, and of which he received information from the parish clerk, is not admissible in evidence, nor is the private memorandum of the fact made by the clerk, who was present at the baptism.

EJECTMENT. At the trial before *Vaughan* B., at the Spring assizes for the county of *Worcester* 1828, the question was, Whether the defendant, *Aaron Bray*, was the legitimate son of his father? On the part of the defendant, among other evidence, the register-book of baptisms of the parish of *Castlemorton*, in the county of *Worcester*, for the year 1776, was produced; and it contained an entry of baptism of *Aaron*, the son of *John Bray*, and *Elizabeth* his wife, on the 6th of *February* 1776. It appeared, on cross-examination of the witness,

that

account of the baptisms, &c.
which had been preserved, we
was no doubt that Mr. *Smith* h
entries in the register-book. It
circumstances, that neither the
randa made by the clerk were
The learned Judge received t
been found for the defendant, a
had been obtained, on the gr
ought not to have been received

Campbell and *R. V. Richards*
register was properly received i
who must have been present a
entry on paper which was aft
register-book by the incumber
true, he was not incumbent at t
ening took place; but the cler
the minute of the fact, contir
became incumbent. The regis
dence, and ought to have been f
cumbent, after baptizing an i
makes an entry in the register

1828.

Doe dem. WARREN *against* BRAY.

time of the baptism, was not the minister of the parish. But if the register was falsified, by shewing that the entry was made by Mr. *Smith* after he became minister of the parish, it was set up again as a good register, by shewing the source from which the entry itself was taken. [*Bayley* J. The memoranda would not be evidence. In *Newham* v. *Raithby* (*a*), copies of the register of a dissenting chapel were not allowed to be pleaded in evidence, on the ground that they were not copies of public documents which were in official custody. And if the private memoranda of the clerk not made in the register-book would not be evidence, how can an entry made from them into the register-book be evidence? In the case of *May* v. *May*, (*b*) cited 3 *Burn*, 299., the question arose on the plaintiff's legitimacy; and on his part a general parish register was produced, in which there was an entry of his christening, describing him in the same manner as legitimate children were usually entered. It appeared that the practice was, to make entries in the register once in three weeks, out of a day-book, in which entries were made immediately after the christening on the same morning; and in the case of illegitimate children, to insert in the entry the letters B.B., which were intended to signify "base-born." The defendant's counsel then offered in evidence the day-book from which the other entry was posted, and in which the letters B. B. were inserted, insisting that it was the original entry. But a majority of the judges present, at a trial at bar, were of opinion that such evidence ought not to be received, on the ground that there could not be two registers in the parish, and that the one first produced ought to be taken to be the true register."] In that

(*a*) 1 *Phill.* 15. (*b*) 2 *Str.* 1072.

case

1828.

Doe dem. Warren against Beat.

case the register had been completed; b
case it is contended by the plaintiff, that
register never has been perfected, and if t
and the memoranda be received in evide
will not be two registers. If the entry in th
book be admissible, it will be sufficient. [L
By the 70th canon, 3 *Burn's E. L.* 290., u
of all persons christened are required to be
the register-book at the end of every week.
One ground why a register is evidence is, be
made by a person who has a public duty to
Here the register is made up by a person, who,
this baptism was concerned, was a perfect str
the transaction. He had no connection with t
at the time when the baptism took place.]
the entry to have been made in the register-
the clerk during the lifetime of the first incu
surely would have been admissible in evidence? [.
In that case it might be presumed, that the c
authorized by the minister to make the entry,
it would be the act of the minister; but we can
sume that an entry made after his death was
his direction.]

1828.

Doe dem. WARREN against BRAY.

person who appeared at that time to have any connection with the parish, — but by one who afterwards became the minister of the parish. It must be taken, therefore, that he made this entry after the death of the minister of the parish who was present at this baptism. He was recording a fact, therefore, not within his own knowledge, but one of which he received information from the clerk. I think, therefore, the register itself clearly ought not to have been received in evidence. But, then, supposing there was no register, it has been said, that the clerk's memoranda were admissible evidence to prove all the facts that could be proved by a register. It was not his duty to make such memoranda: they are mere private entries. *May* v. *May*, to which I referred during the argument, shews that a day-book, from which the entries in a register were made, is not admissible in evidence. The editor of *Burn's Eccl. Law*, after stating that case in vol. iii. p. 293., makes the following observation: — "If, indeed, the entry in the day-book, representing the plaintiff as illegitimate, had been signed by the reputed father or the mother, or made under their direction, such evidence would have been admissible as the *declaration* of a deceased parent on a question of legitimacy; for the declarations of deceased persons, supposed to have been married, (who might themselves be examined, if alive,) are admissible to disprove the fact of marriage (*a*); but if, on the other hand, in the absence of such proof, the entry appeared to be merely a private memorandum, kept for the purpose of assisting the clerk to make up the register (and of that nature it seems here to have been considered), in that case it should not be received as the

(*a*) *Rex* v. *Bramly*, 6 *T. R.* 330.

1828.

Doe dem. WARREN against BRAY.

original authenticated entry." The editor, therefo thought that the entry in the day-book would not receivable in evidence in the character of a register, l that if it had been signed by the reputed father a mother, it might have been received as a declaration the deceased parents. In the case of *Newham* v. *Rail by* (a), the copies of the register of a dissenting chap were not allowed to be pleaded in evidence in the eccl siastical court, on the ground that they were mere priva memoranda, and not copies of public documents, whic are in official custody. So, in this case, the entries mad by the clerk were mere private memoranda. They were not, therefore, admissible in evidence. The rule for a new trial must be made absolute.

Rule absolute for a new trial

(a) 1 *Phill.* 315.

AN

INDEX

TO THE

PRINCIPAL MATTERS.

hear the appeal. *Rex* v. *The Justices of Wilts*, *T.* 9 *G.* 4. Page 380

3. By the statute 4 *G.* 4. *c.* 95. *s.* 87. a right of appeal is given in certain cases, if the party gives notice within six days after the cause of complaint arises. Two justices having made an order upon the surveyors of the roads in a township to perform a certain part of the statute duty on a turnpike-road running through the township, and to pay to the surveyor of that road a certain part of the money received as a composition for statute duty: Held, that the cause of complaint did not arise until a copy of the order in writing had been served, and that notice of appeal given within six days from that time was valid. *Rex* v. *The Justices of Lancashire*, *M.* 9 *G.* 4. 593

4. *Semble*, that it is unnecessary to enter and respite an appeal at the next sessions, where the order of removal is served so late as to render it impossible to try the appeal at those sessions. *Rex* v. *The Justices of Kent*, *M.* 9 *G.* 4. 639

5. An order of removal was served too late to enable the parish to which the pauper was removed to try an appeal at the next sessions; but it might have been entered and respited at those sessions: Held, that that was unnecessary, and that, due notice of the intention to prosecute the appeal at the second sessions having been given, the court of quarter sessions were bound to hear and determine it. *Rex* v. *The Justices of Devon*, *M.* 9 *G.* 4. 640

ARBITRAMENT.

See EVIDENCE, 5.

One of two partners gave his son a power of attorney "to act on his behalf in dissolving the partnership, with authority to appoint any other person as he might see fit:" Held, that this gave the son power to submit the accounts to arbitration. *Henley* v. *Soper*, *E.* 9 *G.* 4. Page 16

ARREST.

Where, by the contrivance of plaintiff's attorney, a party had been arrested on a *Sunday* on criminal process, for the purpose of effecting his arrest on civil process, and he was detained in custody till *Monday*, and then arrested on the civil process, the Court ordered him to be discharged out of custody. *Quære*, Whether a party can be arrested a third time for the same cause of action? *Wells* v. *Gurney*, *M.* 9 *G.* 4. 769

ASSIGNMENT.

See COVENANT, 1.

ASSUMPSIT.

1. Where *A.* and *B.* deposited money in the hands of a stakeholder, to abide the event of a boxing-match between them; and after the battle *A.* claimed the whole sum from the stakeholder, and threatened him with an action if he paid it over to *B.*, which he nevertheless did by the direction of the umpire: Held, that *A.* was entitled to recover from him his own stake, as money had and received to his use. *Hastelow* v. *Jackson*, *E.* 9 *G.* 4. 221

2. *A.*, having a patent for certain spinning machinery, received an order from *B.* to have some spinning-frames made for him. *A.* employed *C.* to make the machines

machines for *B.*, and informed the latter that he had so done. After the machines had been completed, *A.* ordered them to be altered. They were afterwards completed according to this new order, and packed up in boxes for *B.*, and *C.* informed *B.* that they were ready, but he refused to accept them: Held, that *C.* could not recover the price from *B.* in an action for goods bargained and sold, or for work and labour, and materials. *Atkinson and Others, Assignees,* v. *Bell and Others, E.* 9 *G.* 4. Page 277

3. Where *A.*, at the request of *B.*, entered into a bond with him and *C.* to indemnify *D.* against certain debts due from *C.* and *D.*, and *B.* promised to save *A.* harmless from all loss by reason of the bond: Held, that this promise was binding although not in writing, and that *A.* might recover from *B.* the whole of the monies which he was compelled to pay by virtue of the bond. *Thomas* v. *Cook, M.* 9 *G.* 4. 728

ATTACHMENT.

See EVIDENCE, 5.

ATTORNEY.

1. The court will not compel an attorney to pay a sum of money he has received in his character of attorney; he having after the receipt of the money become bankrupt and obtained his certificate. *Exparte Culliford* v. *Warren, Gent., one, &c. E.* 9 *G.* 4. 220

2. Where a judge's order for taxing an attorney's bill is not obtained until after he has commenced an action for the amount, the defendant is not entitled to the costs of taxation, although more than one sixth is taken off by the master. *Jay, Gent., one, &c.* v. *Coaks, M.* 9 *G.* 4. Page 635

BANKRUPT.

See ATTORNEY,

1. *A.* kept cash with *M.* and Co., bankers, and accepted a bill drawn by one of the partners in the house of *M.* and Co., and indorsed by that partner to *M.* and Co., who discounted it, and afterwards indorsed it for value to *S.* Before the bill became due, *M.* and Co. became bankrupts, having funds in the hands of *S.* more than sufficient to pay the bill, and having in their hands money belonging to *A.* When the bill became due, *S.* presented it for payment to *A.*, who having refused payment, *S.* paid himself the amount out of the funds of *M.* and Co. remaining in his hands, and delivered the bill to their assignees: Held, in an action brought by the assignees against *A.* as acceptor of the bill, that there had been, before the bankruptcy, a mutual credit between the bankrupts and *A.*; and that the latter was entitled to set off, against the sum due to the bankrupts on the bill, the debt due to him from *M.* and Co. at the time of their bankruptcy. *Bolland and Others, Assignees,* v. *Nash, E.* 9 *G.* 4. 105

2. Where a creditor obtained judgment by nil dicit against a trader, and thereupon issued a fi. fa., under which the sheriff seized the goods of the trader, who afterwards, and before the goods were sold, committed an act of bankruptcy, upon which a commission issued, and he was duly declared a bankrupt, of which the

Quære, whether the sheriff was justified in selling the goods after notice of the bankruptcy. *Notley and Others, Assignees,* v. *Buck, E.* 9 *G.* 4. Page 160

3. Where a party committed by commissioners of bankrupt, for not answering to their satisfaction, wishes to be again brought before them, he must bear the expence of that proceeding. *Ex parte Baxter, T.* 9 *G.* 4. 344

4. In *August* 1821, *A.*, a trader, being indebted to *B.* and *C.*, then in partnership, but about to separate, gave a warrant of attorney to secure payment by instalments to *B.* alone, who knew that *A.* was then insolvent. In *October A.* committed an act of bankruptcy, and in *November*, at *B.*'s desire, he sent goods to the warehouse of *B.* and *C.* as a further security for the debt. In *December B.* and *C.* dissolved partnership; and the former afterwards received from *A.* several sums of money on account of the warrant of attorney, and also sold the goods, towards satisfaction of the debt. A commission of bankrupt issued against *A.* in *January* 1823, and in *November* of that year *B.* died: Held, that *A.*'s assignees might recover from *C.* the money paid by *A.* on the warrant of attorney, by an action

proce
signe
Wash

6. *A.* a
sold
sion t
a bill
by *D*
keep
and s
a cert
becan
and C
for th
order
the p
bill.
the
bankr
over
quest,
them
turne
made
broug
could
after
and
apply
the b
hands
becau
sumed
agents
of the
also b
vernel

vessel at her homeward port, the whalebone was taken into the possession of *B.* and sold by him, and the proceeds were applied in part of discharge of the expences of the ship. The blubber was deposited in a warehouse rented of *C.* by the owners of the ship, and the oil produced from it was then put into casks, each owner's share being weighed out and placed separately in the warehouse, in casks marked with his initials. After the division, the practice was for the warehouseman to deliver to the order of each part-owner his share of the oil, unless notice was given by the ship's husband that the part-owner's share of the disbursements had not been paid. In that case the warehouseman used to detain the oil till the ship's husband's demand had been satisfied. The ship having arrived from her voyage in 1825, the above course was followed. The share weighed out and set apart for *A.* was twenty-nine tons, which was stowed in the warehouse in casks, and which had *A.*'s initials put on them. In *January* 1826 *A.* became bankrupt: twenty tons of the oil had been delivered to *A.* before his bankruptcy; the remaining nine tons remained in the warehouse at the time of the bankruptcy. In *January* 1826, the warehouseman had orders from *C.*, the ship's husband, not to deliver to *A.* the remaining oil, as his share of the disbursements of the ship had not been paid: Held, in an action of trover brought by the assignees of *A.* against *C.* for the residue of *A.*'s oil, that the other part-owners had originally a lien on it for his share of the disbursements of the ship; and that this right was not divested by the separation of *A.*'s share from the residue, and placing it in casks marked with his name. *Holderness and Another, Assignees,* v. *Shackell, M.* 9 *G.* 4. Page 612

8. Where the assignees of a bankrupt enter the premises of a third person, to seize goods which were the property of the bankrupt, it is not necessary that an action against them should be brought within three months after the fact committed, the act of the assignees not being done "in pursuance of the statute," within the meaning of the 6 *G.* 4. *c.* 16. *s.* 44. *Edge* v. *Parker, M.* 9 *G.* 4. 697

9. Judgment was entered up on a warrant of attorney given by two joint-traders, and a fi. fa. issued, returnable on the 2d of *May*. On the 1st of that month, the sheriff's officer received from the defendants the money directed to be levied. On the 2d of *May* one of them committed an act of bankruptcy, and the other on the 5th. On the 11th a commission of bankrupt issued, and on the 19th the sheriff paid over the money to the execution-creditor. In an action by the assignees: Held, that he was entitled to retain it, not being a creditor having security at the time of the bankruptcy. *Morland* v. *Pellatt, M.* 9 *G.* 4. 722

BAPTISM.

See EVIDENCE, 26.

BERWICK-UPON-TWEED.

See RATE.

BILL OF EXCHANGE.

See EVIDENCE, 9.

1. To an action upon a joint and several promissory note of *A.* and

B., the

B., the latter being a mere surety, brought by payee against the administrator of *B.*, the defendant pleaded that the cause of action did not accrue within six years, upon which the plaintiff took issue. The plaintiffs proved, that within six years, and during the lifetime of *B.*, *A.* made a payment on account of the note; *B.* afterwards died: Held, that such payment operated as a new promise by *B.* to pay according to the nature of the instruments, and that his administrator was liable on the note. *Burleigh and Others, Executors,* v. *Stott, Administratrix, E.* 9 *G.* 4. Page 36

2. *A.* kept cash with *M.* and Co., bankers, and accepted a bill drawn by one of the partners in the house of *M.* and Co., and indorsed by that partner to *M.* and Co. who discounted it, and afterwards indorsed it for value to *S.* Before the bill became due, *M.* and Co. became bankrupts, having funds in the hands of *S.* more than sufficient to pay the bill, and having in their hands money belonging to *A.* When the bill became due, *S.* presented it for payment to *A.*, who having refused payment, *S.* paid himself the amount out of the funds of *M.* and Co. remaining in his hands, and delivered the bill to their assignees: Held, in an action brought by the assignees against *A.* as acceptor of the bill, that there had been before the bankruptcy a mutual credit between the bankrupts and *A.*; and that the latter was entitled to set off, against the sum due to the bankrupts on the bill, the debt due to him from *M.* and Co. at their time of their bankruptcy. *Bolland and Others, Assignees,* v. *Nash, E.* 9 *G.* 4. 105

3. A member of a joint-stock company was employed by the company as their agent to sell goods for them, and received a commission of two *per cent.* for his trouble, and *one per cent. del credere* for guaranteeing the purchaser. Having sold goods on account of the company, he drew on the purchaser a bill of exchange, payable to his, the drawer's own order, and after it had been accepted, he indorsed it to the actuary of the company, and the latter indorsed it to another member, who was the managing director, and who purchased goods for the company: the company were then indebted to him in a larger amount than the sum mentioned in the bill. The acceptor having become insolvent before the bill became due, the drawer received from him 10*s.* in the pound upon the amount of the bill by way of composition: Held, first, that the indorsee, being a member of the company, could not sue the drawer on the bill, inasmuch as it was drawn by the latter on account of the company; and that he could not recover the sum received by the drawer on the bill, because that money must be taken to have been received by him in his character of a member of the company, and not on his own account. *Teague* v. *Hubbard, T.* 9 *G.* 4. Page 345

4. The indorsee of a bill of exchange dishonoured by the acceptor, being ignorant of the place of residence of one of the indorsers, employed an attorney to give notice to him and the other prior indorsers; the attorney, after enquiry, having received information of this indorser's place of residence, on the following day consulted his client, and on the third day sent notice

notice of the dishonour of the bill: Held, that the notice was sufficient. *Frith* v. *Thrush*, *T.* 9 *G.* 4. Page 387

5. In an action by the indorsee against the drawer of a bill, it appeared by the plaintiff's case that he had received it from the acceptor in discharge of a debt due from him. For the defendant it was stated, that the bill was accepted in discharge of part of a debt due from the acceptor to the drawer; that it was indorsed and delivered to the acceptor, in order that he might get it discounted; and that he delivered it to the plaintiff upon condition, that if he procured cash for it, he might retain out of it the amount of the debt due to him from the acceptor; but that he never did get cash for the bill: Held, that the acceptor could not be examined to prove these facts; for, although he was uninterested as to the amount sought to be recovered on the bill, he was interested as to the costs, against which he would have to indemnify the defendant if the plaintiff obtained a verdict. *Edmonds* v. *Lowe*, *T.* 9 *G.* 4. 407

6. A bill of exchange was drawn by *A.* upon *B.* for the accommodation of *C.*, who indorsed it for value to *D.* Neither *A.* nor *C.* had any effects in the hands of *B.* The bill was dishonoured by *B.* Held, that the drawer was entitled to notice. *Norton* v. *Pickering*, *M.* 9 *G.* 4. 610

7. A bill of exchange drawn in America, on a house in *London*, payable to order, was indorsed by the payee generally to *A.*, and by him in these words: "Pay to *B.* or his order for my use." *B.* applied to his bankers to discount the bill, and they, without making any enquiry, did so, and applied the proceeds to the use of *B.*: Held, that the indorsement was restrictive; that the property in the bill remained in *A.*, and that he was entitled to recover the amount of the bill from the bankers. *Sigourney* v. *Lloyd and Others*, *M.* 9 *G.* 4. Page 622

BILL OF MIDDLESEX.

See PLEADING, 11.

BOND.

See SIMONY.

1. In an action upon a bond given to bankers, conditioned for the fidelity of a clerk, entries of the receipt of sums of money made by the clerk in books kept by him in the discharge of his duty as clerk, are, after his death, evidence against his sureties of the fact of the receipt of the money. *Whitnash and Another* v. *George and Another*, *M.* 9 *G.* 4. 556

2. The condition of a bond recited, that *A.* was indebted to *B.* in various sums of money, which were all stated in pounds sterling, and money of a smaller denomination, and that the bond was given to secure payment of those sums In the obligatory part of the bond the word *pounds* was omitted; it merely stated, that the obligor became bound in 7700 without stating what description of money: Held, that from the condition the intent manifestly was, that the obligor should become bound in 7700 *pounds*, and that the word pounds might therefore be supplied. *Cole, Administrator*, v. *Hulme*, *M.* 9 *G.* 4. 568

3. Where *A.*, at the request of *B.*, entered into a bond with him and *C.*, to

BRIDGE.

See INDICTMENT, 2.

BROKER.

See TROVER, 2.

BURIAL.

CERTIORARI.

See INDICTMENT, 3. PRACTICE, 4.

and previous to commencing the discharge of her homeward cargo. (Certain other stipulations for payment of freight, if the ship were detained in *India*, were then made.) And it was further agreed, that *G. B.* should remit all freight-bills for the homeward cargo to *B. B.* and Co. in *London*, who should hold them as joint trustees for the owner and *G. B.*; that they should first be applied to the payment of the balance of freight due from *G. B.*, and the surplus, if any, be handed over to him. It was then provided, that the owner should have an agent on board, who was to have the sole management of the ship's stores, and power to displace *G. B.* for breach of any covenant in the charter-party, and appoint another commander. *C.* and Co. in *Calcutta*, having knowledge of this instrument, shipped goods on board the vessel for *London*, which were never delivered there. Held, that they might recover against the owner, notwithstanding the agreement between him and *G. B.*; for that it was in the nature of a special appointment of the latter to the command, and was not a charter of the vessel to him. *Colvin* v. *Newberry*. *E.* 9 *G.* 4. Page 166

CHOSE IN ACTION.

The general rule of law is, that a debt cannot be assigned. The exception to that rule is, that where there is a defined and ascertained debt due from *A.* to *B.*, and a debt to the same, or a larger amount due from *C.* to *A.*, and the three agree that *C.* shall be *B.*'s debtor instead of *A.*, and *C.* promises to pay *B.*, the latter may maintain an action against *C.* But in such action it is incumbent to shew, that, at the time when *C.* promised to pay *B.*, there was an ascertained debt due from *A.* to *B.* *Fairlie* v. *Denton and Another*. *T.* 9 *G.* 4. Page 395

CHURCH.

See BURIAL.

CHURCHWARDEN.

See MANDAMUS, 2.

COLLECTOR.

See DISTRESS, 3.

A local act for enlarging, cleansing, paving, and lighting the streets, &c. in the city of *London*, authorized the commissioners to order a rate in the several wards of the city of *London*, to be made by the aldermen and the major part of the common-councilmen, upon all persons who inhabited, held, occupied, possessed, or enjoyed any land, house, shop, warehouse, &c. or other tenement or hereditament within the said several wards, and who, by the laws then in being, should be liable to be rated to the relief of the poor. By another clause, it was made lawful for the alderman and the major part of the common-councilmen of each ward, at a court of wardmote to be holden for the choice of ward officers, to return to the wardmote the names and places of abode of a competent number of substantial inhabitants of such ward, of whom so many as the alderman, &c. should think fit and direct, not exceeding half the number of persons so returned, should be so chosen at the said wardmote to be collectors

lectors of the said rates and assessments for one year: Held, that the word *inhabitant* in the latter clause meant resiant; and, therefore, that one of the several partners in a commercial establishment who occupied a house for the purpose of his business in the ward, but who resided elsewhere, was not liable to serve the office of collector of the rates. *Donne* v. *Martyr*. *E.* 9 *G.* 4.
Page 62

COLONIAL COURT.

See DEBT, 1.

COMMENCEMENT OF ACTION.

See EVIDENCE, 9. PLEADING, 13.

COMMISSIONERS OF BANKRUPT.

See BANKRUPT, 3.

By the 6 *G.* 4. *c.* 16. *s.* 33., commissioners of bankrupt are authorized, by writing under their hands, to summon before them certain persons; and if any such person so summoned shall not come before them at the time appointed, having no lawful impediment made

time when the witne
thereby required to atten
that the question whet
service of the summons
that respect reasonable
was a question of fact to
mitted to a jury. *Semb*
the commissioners are not
to have information on
the service of the summ
fore they issue their w
but that it is sufficient
summons be actually
Groocock v. *Cooper*. *E.*
Pa

COMMISSIONERS O SEWERS.

Where commissioners of s
acting bonâ fide for the
of the levels for which the
appointed, erected certa
fences against the inroads
sea, which caused it to flo
greater violence against a
jure the adjoining land not
the levels: Held, that they
not be compelled to make
pensation to the owner o
land, or to erect new wo
his protection, for that all
of land exposed to the i
of the sea, or commission
sewers acting for a numl

CONTINUANCE.

See PLEADING, 11.

CONVICTION.

By stat. 6 *G.* 4. *c.* 108. *s.* 3. if any vessel therein described shall be found on the high seas within 100 leagues of any part of the coast of the United Kingdom, or shall be discovered to have been within the said distance, having on board the goods therein specified, the goods and the vessel shall be forfeited. By section 49. every person who shall be found or discovered to have been on board any vessel liable to forfeiture under that act for being found or discovered to have been within any of the distances or places mentioned in the act from the United Kingdom, shall forfeit 100*l.*, and may be detained and taken before two justices, to be dealt with as thereinafter mentioned. By section 74. any offence against that act shall, for the purpose of prosecution, be taken to have been committed, and the penalties incurred, at the place on land in the United Kingdom into which the person committing such offence, or incurring such penalty, shall be taken, brought, or carried; and in case such place on land is situate within any city, &c., the justices of the peace for the city, &c., as well as those for the county within which such city is situate, shall have jurisdiction to try all offences committed upon the high seas against the act. A vessel liable to forfeiture under this act was seized in a part of the river *Orwell* where the justices of *Ipswich* had jurisdiction, and a person found on board the vessel was taken to *Harwich*, and prosecuted before two justices of that place, who convicted him in a penalty of 100*l.* for having been found *on the high seas* on board a vessel liable to forfeiture: Held, that the justices of *Harwich*, being justices at the first place on land to which the party was carried, had jurisdiction to try the offence. When the vessel was first boarded, she was just entering the harbour of *Harwich:* Held, that in the absence of all other evidence, a person then found on board, might properly be found to have been on board on the high seas. *In the Matter of J. Nunn, M.* 9 *G.* 4. Page 644

CORNWALL, DUCHY OF.

See EVIDENCE, 24, 25, 26.

CORPORATION.

1. By an act of parliament certain persons were incorporated as the *Hull* Dock Company, and premises (before the property of the crown) were given to them for the purposes of the act, and they were authorized to make a dock, quays, wharfs, &c., which it was enacted should be vested in them for the purposes of the act. Amongst other things it was provided, that "all goods, &c. which should be *landed or discharged* upon any of the quays or wharfs which should be erected by virtue of that act, should be liable to pay, and should be charged and chargeable with the like rates of wharfage and payments as were usually taken or received for any goods, &c. *loaded or discharged* upon any quays or wharfs in the port of *London:*" Held, that as the premises were only vested in the company for the purposes of the

the act, they had no common-law right to a compensation for the use of them, and that the statute did not give them any right to claim wharfage for goods shipped off from their quays. *The Dock Company at Kingston-upon-Hull* v. *La Marche, E.* 9 *G.*4.
Page 42

2. Where a party had been sworn into and had exercised a corporate office for more than six years, the Court, in the exercise of their discretion, and without deciding whether he was protected by the 32 *G.* 3. *c.* 58., refused to grant a quo warranto information against him, on the ground of his not having been sworn in before the proper officer. *Rex* v. *R. Brooks, T.* 9 *G.*4. 321

3. Where an election to an office in a corporation was to be made by a select body appointed by the charter to be aiding the mayor: Held, that the mayor was not bound to give to the members of such select body specific notice of a meeting to be holden for the purpose of such election; but that a reasonable and usual notice, requiring them to attend at a meeting of the corporation, at a time specified, without stating for what purpose the meeting was called, was sufficient. *Rex* v. *Pulsford, T.* 9 *G.* 4. 350

4. Information for usurping the office of jurat of the borough of *Q.* Plea, that the borough of *Q.* was a free borough, and that the burgesses of the borough were a body corporate, consisting of the mayor, bailiffs, and burgesses of the borough, and that by charter it was granted that the mayor, bailiffs, and burgesses, by whatever name they had before been incorporated, should thereafter be a body corporate by the name of "mayor, jurats, bailiffs, and burgesses;" that there should be one of the more honest and discreet burgesses *or* inhabitants called "mayor," to be elected as therein mentioned; and four honest and discreet burgesses *or* inhabitants called "jurats;" and *two* other honest and discreet burgesses *or* inhabitants called "bailiffs;" that the jurats and bailiffs should hold their offices for life, unless removed for reasonable cause; and whenever it should happen that either or any of the jurats or bailiffs for the time being should die, or be removed or withdrawn from his or their office or offices, it should be lawful for the surviving and remaining jurats and bailiffs for the time being, or the greater part of them (of whom the mayor should be one), within convenient time, to nominate another or others of the burgesses *or* inhabitants of the borough for the time being to be a jurat or jurats, bailiff or bailiffs of the borough. The plea then stated a vacancy in the office of jurat, and that the defendant, being an inhabitant of the borough, was duly elected to be a jurat. Replication, first, putting in issue the due election of the defendant; and, secondly, that from the time of granting the charter hitherto, it had been used and accustomed within the borough that every inhabitant of the borough elected to be a jurat, before he took upon himself the office of jurat, should be sworn and admitted a free burgess of the borough, and that the defendant, before he took upon himself the office of jurat, had not been admitted and sworn a burgess. Demurrer. Upon the trial of the issues in fact, it appeared that at the

the election of the defendant there were present the mayor, two bailiffs, and two jurats: Held, that the election was valid, for the general rule, that a majority of each definite part of the elective body should be present at the election, could not apply to this corporation, because in the event of the death or removal of one of the bailiffs, it was impossible that at the election of a new bailiff there should be present a majority of the bailiffs.

Held, upon demurrer to the replication, that according to the true construction of the charter, it was competent to the corporation to elect the jurats from the inhabitants of the borough or from the burgesses, and therefore that the plea was good, inasmuch as it shewed that the defendant was an inhabitant of the borough at the time when he was elected to the office of jurat. *Rex* v. *Greet*, *T.* 9 *G.* 4.

Page 363

COSTS.

See INDICTMENT, 3. PRACTICE, 4. 9. 13, 14. 16.

COVENANT.

See DEED, 1.

Covenant against the assignee of the lessee for non-payment of rent. Plea, that before the rent became due the defendants assigned all their estate and interest in the demised premises to *A. B.* Replication, that in and by the indenture the lessee, for himself, his executors, administrators, and assigns, covenanted that he, his executors or administrators, should not assign the premises thereby demised without the consent of the lessor, and that no consent was given: Held, upon demurrer, first, that the replication was bad, inasmuch as the covenant of the lessee not to assign, did not stop the assignee from setting up the assignment; and, secondly, that the action being founded on privity of estate, the liability of the defendant ceased as soon as the privity of estate was destroyed. *Paul* v. *Nurse and Others*, *T.* 9 *G.* 4. Page 486

DEBT.

See EVIDENCE, 13. LANDLORD AND TENANT, 6.

Debt lies on the decree of a colonial court made for payment of the balance due on a partnership account. *Henley* v. *Soper the Elder*, *E.* 9 *G.* 4. 16

DEED.

See TRESPASS, 3.

1. An indenture recited, that *A.* and *B.*, in *May* 1813, had entered into a contract with the commissioners for victualling the navy to supply his majesty's ships with sea provisions and victualling stores, and that the said *A.* and *B.* in *September* 1813, had mutually agreed to dissolve the copartnership entered into by them as aforesaid for carrying on the business of the said contract, and all other contracts entered into with the commissioners by *B.* or *A.*, and in which they or *either of them* were in anywise interested or concerned, and all other copartnerships whatsoever subsisting between them; and upon the treaty for such dissolution it was agreed, that the share of *B.* in the property belonging to the copartnership should

should be estimated at 50,000*l.*, and be taken by *A.* at that sum. It then further recited, that it had been agreed that *A.* should by his bond indemnify *B.* against all damages by reason of his having entered into the said recited contract with *A.*, and by reason of all other contracts entered into by *B.* and *A.* respectively, and in which they, *or either of them*, had any interest as aforesaid. The indenture then witnessed that *A.* and *B.*, by mutual consent, dissolved the said copartnership so entered into, and then or lately subsisting between them, for supplying his majesty's ships with provisions and stores, under or by virtue of the said recited contract, and of all other contracts in which *B.* and *A.*, *or either of them*, had any interest or concern as aforesaid. The deed then contained a mutual release of all actions, accounts, reckonings, &c. which either of them *A.* and *B.* now had or ever had, or which either of them, or either of their executors should or might thereafter have, claim, or demand against, from, or under the other of them, or his heirs, executors, &c., for or by reason of the said copartnership or co-

contract debts and sums of m
or any part thereof, and a
goods, stock, and effects
soever then belonging to
the said *A.* and *B.* as suc
partners respectively, and a
right, title, and interest of h
of, in, to, from, out, or in re
of the *premises*. A powe
then given to *A.* to recove
give discharges for the said

At the time when this
was executed, *B.* and *A*
been concerned in condu
business together as contra
for the navy. In some con
B. was solely interested as
tractor; in others *A.* was s
interested as contractor; an
some they were jointly intere
as partners and contractors.
had, however, both been
cerned in all the contracts
having been agent in mana
those contracts in which *B*
solely interested, and *B.* ha
been agent in managing
contracts in which *A.* was s
interested. And there was m
due from the commissioner
the navy in respect of eac
these classes of contracts,
C., the executor of *B.*, rec
the amount of those sums
the commissioners: Held,

debts, and premises thereby assigned without any let, suit, interruption, or denial of *B.*, his executors or administrators, or any person claiming under him or them: Held, that the words "for and notwithstanding any act done by *B.*," being inconsistent with the subsequent part of the covenant, ought to be rejected; and therefore that it was a sufficient breach of that covenant to allege a receipt of the money by the executor of *B.* in respect of the contracts mentioned in the indenture. *Belcher* v. *Sikes*, *E.* 9 *G.* 4. Page 185

2. By marriage settlements between *W. M.* and *T. M.*, son and heir apparent of *W. M.*, of the first part; *J. H.* and *Mary H.*, of the second part; and *L. G.* and *J. H.*, trustees, of the third part; *W. M.* and *T. M.* bargained and sold to the trustees certain lands called *Ninnisses* and *Sandry's Fields*, and other lands called *Varwell*, then in possession of *W. M.* and *T. M.*, to hold unto the trustees, their heirs and assigns, as to *Sandry's Fields* and *Ninnisses*, to the use of *W. M.* for life, remainder to the use of the trustees during the life of *W. M.*, upon trust to preserve contingent remainders; with remainder to the use of the said *T. M.* for life; remainder to the said trustees and their heirs during the life of *T. M.*, upon trust to preserve contingent remainders; with remainder to the first and other sons of *T. M.* by *M. H.* successively in tail male, with remainder to the use of the right heirs male of *T. M.* for ever; and as to all the other settled premises, to the use of *T. M.* for life, with remainder to the use of trustees, their heirs and assigns, during the life of *T. M.*, in trust to preserve contingent remainders; with remainder to the use of *M. H.* for her life, for raising out of the rents and profits an annuity of 25*l.* per annum, and subject thereto to the use of the first and other sons of *T. M.* by *M. H.* successively in tail male, with remainder for want of issue male by *T. M.* on the body of *M. H.* begotten, or if such issue male should die without issue male, and *T. M.* should have any daughter or daughters by *M. H.* at the time of his death, then that the trustees, their heirs and assigns, should stand seised of the said hereditaments to the use of the issue female of *T. M.* by *M. H.* for raising portions as therein mentioned to such daughter and daughters, and that until twenty-one the trustees and their heirs should, out of the rents, raise such maintenance of such daughter and daughters as to the trustees should seem meet; and after raising the said sums for the maintenance for such daughter and daughters as aforesaid, or in default of issue female, to the use of the right heirs *male* of *T. M.* for ever: Held,

First, that the last words were words of limitation, and not of purchase, and that *T. M.* took the ultimate remainder in fee; and,

Secondly, if they were words of purchase, still they would create a contingent remainder during the life of *T. M.*, which would vest immediately upon his death in his heir, who might devise the same.

Thirdly, that by the limitation as to the *Varwell* and *Crugmere* closes, the trustees took an estate only during the infancy of the daughters; and,

survivor of them devised the estate to his wife for life, remainder to all and every the children of *Richard E.* and *M. P.* who should be living at the time of his wife's death. There were living at her death nine children of *R. E.* and *M. P.* Of these, two, during her life and while their estate remained contingent, had levied fines *sur conusance de droit come ceo* of their shares. In *April* 1824, *A. B.* entered upon the lands comprised in the marriage settlement, and kept possession, and in *May* 1824, all the children of *R. E.* and *M. P.* by lease and release conveyed the lands comprised in the marriage settlement, in given proportions, to a purchaser: Held, that the children of *R. E.* and *M. P.* might convey their interests without having first made any entry in the lands, although *A. B.* was in possession.

Secondly, as to the shares of the two who had levied fines while their estates were contingent, that their interest was not thereby extinguished. *Doe dem. Brune and Another* v. *Martyn*, *T.* 9 *G.* 4. Page 497

DEEPING FEN.

would be a finding, that one piece of ground was appurtenant to another, which in law could not be; or that the mere use of the land passed by the indenture, and that was a mere privilege or easement, out of which rent could not issue, and consequently that the lessor could not distrain, for rent in arrear, barges, the property of *B.*, lying in the space between high and low water mark, and attached to the wharf by ropes. *Buszard and Others, Assignees,* v. *Capel, E.* 9 *G.* 4. Page 141

2. Where a landlord's agent went upon the tenant's premises, walked round them, and gave a written notice that he had distrained certain goods lying there, for an arrear of rent, and that unless the rent was paid, or the goods replevied within five days, they would be appraised and sold, and then went away, not leaving any person in possession: Held, that this was a sufficient seizure to give the tenant a right of action for an excessive distress; and that quitting the premises without leaving any one in possession, was not an abandonment of the distress, the 11 *G.* 2. *c.* 19. *s.* 10. giving the landlord power to impound or otherwise secure on the premises goods distrained for rent arrear. *Swann* v. *The Earl of Falmouth, T.* 9 *G.* 4. 456

3. The statute 38 *G.* 3. *c.* 5. *s.* 9. enacts, "That the collectors of the land-tax shall levy and collect the rates assessed, according to the intent of that act; and they are required to demand all sums of money taxed and assessed of the parties themselves, as the same shall become due, if they can be found, or else at the place of their last abode, or upon the premises charged with the assessment."

Sect. 17. enacts, "That if any person shall refuse or neglect to pay any sum of money whereat he shall be assessed, upon demand by the collector, it shall be lawful for the collector to distrain," &c. A collector, having made a demand of the land-tax upon the premises, charged at a time when the party liable to pay was absent from home, and not upon the party himself, and distrained immediately after making such demand, the distress was held to be unlawful; for that before he distrained he was bound to allow a reasonable time to elapse after the demand made, in order that the party liable to pay the tax might have an opportunity of complying with the demand.

By sect. 2., the sum therein mentioned is to be levied within the year; and by sect. 12. it is enacted, "That the fourth part of that sum, *for the first quarterly payment,* shall be levied on or before the 24th day of *June* 1798; that the same sum, for the second quarterly payment, shall be levied before the 29th of *September* 1798; the like sum, for the third quarterly payment, on or before the 25th day of *December* 1798; and the like sum, for the last of the quarterly payments, on or before the 25th day of *March* 1799." Semble, That the sums due for the last quarterly payment may be levied by the collector at any time during the current quarter. *Gibbs* v. *Stead, T.* 9 *G.* 4. Page 528

DUCHY OF CORNWALL.

See EVIDENCE, 24, 25, 26.

a rectory, in consideration of his having given a bond to resign in favour of a particular person, at the request of the patron, and was instituted and inducted, and such bond was held to be void, on the ground that it was simoniacal, and the king then presented *A. B.*, and he was instituted and inducted: Held, that he might maintain ejectment for the rectory, against the person who had been simoniacally presented. *Doe on the several demises of Watson, Clerk,* v. *Fletcher, Clerk, E.* 9 *G.* 4. Page 25

2. Ejectment for a messuage and tenement. Judgment entered up generally for the plaintiff: Held, no ground for reversal on error. *Doe d. Lawrie and Another* v. *Dyeball, E.* 9 *G.* 4. 70

3. By a memorandum of agreement, in consideration of the rent and conditions thereinafter mentioned, *A.* was to have, hold, and occupy, as on lease, certain premises therein specified, at a certain rent per acre. And it was stipulated that no buildings should be included or leased by virtue of the agreement; and it was further *agreed and stipulated*, that *A.* should take, at the rent aforesaid, certain other parcels as the same might fall in; and, lastly, it was

pendi
was h
that t
banke
of the
decide
and th
was t
includ
from
March
ment
the d
succe
heir a
seisin
the fi
quent
operat
Doe o
Lawso

5. A co
of a
lord o
from i
a hedg
above
payme
deman
reluct
pier w
lowed
would
He di
sion f
never

6. In ejectment by mortgagee against mortgagor, it is not necessary to demand possession before action brought. Where the mortgagee suffers the mortgagor to remain in possession of the mortgaged premises, the latter is not tenant at will to the former, but at most tenant by sufferance only; and may be treated either as tenant or trespasser at the election of the mortgagee. *Doe on the demise of Roby* v. *Maisey, M.* 9 *G.* 4. Page 767

ESCAPE.

See EVIDENCE, 5.

ELEGIT.

See TRESPASS, 3.

EVIDENCE.

See CONVICTION.

1. Where a defendant pleaded, by way of set-off, a bond given to him by the plaintiff, conditioned for payment of an annuity to a third person, which had been previously granted by the defendant, and that a certain sum was in arrear: Held, that he was not bound to prove that he had paid the money in order to set it off, but that on production of the bond the plaintiff was bound to prove payment. *Penny and Another, Assignees,* v. *Foy, E.* 9 *G.* 4. 11

2. A witness called to prove the receipt of a sum of money was shewn an acknowledgment of the receipt of such money signed by himself, and, on seeing it, said that he had no doubt he had received it, although he had no recollection of the fact: Held, that this was sufficient parol evidence of the payment of the money, and that the written acknowledgment having been used to refresh the memory of the witness, and not as evidence of the payment, did not require any stamp. *Maugham* v. *Hubbard and Robinson, Assignees, E.* 9 *G.* 4. Page 14

3. A will more than thirty years old may be read in evidence without proof of its execution, although the testator has died within thirty years, and some of the subscribing witnesses are proved to be still living.

After the lapse of more than 100 years, Held, that in the absence of evidence to the contrary, the death of a party without issue might be presumed. *Doe on the demise of Oldham and Wife* v. *Wolley, E.* 9 *G.* 4. 22

4. The mother of a pauper stated, that about twenty-four years ago she received money from the parish officers of *S.* to put her son out apprentice, and that she accordingly put him out; that the indenture was signed by her, the pauper, the master, and by a witness; that she gave it to the wife of a market-gardener, who attended the market of *S.*, to take to the overseers of the parish of *S.*; that the market-gardener and his wife were both dead, the latter having survived her husband; that she did not know whether the market-gardener's wife had left any will, but had heard that she had. Evidence was then given that search had been made in the parish chest of *S.* for the indenture, and that it could not be found: Held, that as it was the duty of the overseers if the indenture had come into their possession to deposit it in the parish chest, the presumption was, that

alleged that the plaintiff and *W. B.* having divers disputes, by mutual bonds of submission, referred them to the arbitration of *C.* and *D.*; that an award was made, ordering *W. B.* to pay the plaintiff a certain sum of money on, &c.; and because the award was not performed, plaintiff sued and prosecuted out of the Court of C. P. a writ commanding defendant to attach *W. B.* (then being in his custody), so that he might have his body before the justices of C. P. on, &c., to answer, &c.; and *W. B.* being and remaining in the custody of defendant as such marshal, by virtue of the attachment, on, &c. was brought before Sir *S. G.*, a judge of C. P., at his chambers, by writ of habeas corpus, and by him committed to the custody of the warden of the *Fleet*, and afterwards was brought before Sir *J. L.*, a judge of K. B., at chambers, and by him committed to the custody of the defendant, charged with the attachment; and that the defendant afterwards suffered him to escape: Held, that the plaintiff was bound to prove the execution of the bond of submission by himself as well as by *W. B.* *Semble*, That he need not have done so had he alleged and proved a rule of

his usual place of residence both before and subsequent to the commencement of the action was in *Wales*, is not sufficient. *Jones* v. *Kenrick*, *T.* 9 *G.* 4. Page 337

9. Declaration upon a bill of exchange drawn on the 29th *November* 1827, payable two months after date, was entitled generally of *Hilary* term 1828: Held, that it was competent to the plaintiff to prove, by the parol evidence of the attorney (without producing the writ), that the action was commenced after the 1st of *February* when the bill became due. *Lester* v. *Jenkins*, *T.* 9 *G.* 4. 339

10. Where an indictment for a conspiracy alleged, that "at the court of quarter sessions holden, &c., an indictment against *A. B.* was preferred to and found by the grand jury:" Held, that this allegation must be proved by a caption regularly drawn up of record, and that the minute-book kept by the deputy clerk of the peace could not be received as evidence of the finding of the bill, although no record had been in fact drawn up. *Rex* v. *Smith and two Others*, *T.* 9 *G.* 4. 341

11. An indictment had been preferred against a county for not repairing a bridge, at the instance of the inhabitants of a parish; and the question intended to be tried was, whether the inhabitants of the parish or of the county were liable to repair it? The Court refused to compel the inhabitants of the parish to allow the parties indicted to inspect the parish books and documents relating to the repair of the bridge. *Rex* v. *The Justices of the county of Buckingham*, *T.* 9 *G.* 4. 375

12. A declaration averred that the defendant had notice of the dishonour of a bill of exchange: Held, that that allegation was satisfied by proof that he had notice as soon as it could reasonably be given, and that it was unnecessary, therefore, to state in the declaration the special circumstances which rendered valid the notice given at a later period than in ordinary cases would be sufficient. *Firth* v. *Thrush*, *T.* 9 *G.* 4. Page 387

13. The general rule of law is, that a debt cannot be assigned. The exception to that rule is, that where there is a defined and ascertained debt due from *A.* to *B.*, and a debt to the same or a larger amount due from *C.* to *A.*, and the three agreed that *C.* shall be *B.*'s debtor instead of *A.*, and *C.* promises to pay *B.*, the latter may maintain an action against *C.* But in such action it is incumbent on the plaintiff to shew, that at the time when *C.* promised to pay *B.* there was an ascertained debt due from *A.* to *B.* *Fairlie* v. *Denton and Barker*, *T.* 9 *G.* 4. 395

14. In an action by the indorsee against the drawer of a bill, it appeared by the plaintiff's case that he had received it from the acceptor in discharge of a debt due from him. For the defendant it was stated, that the bill was accepted in discharge of part of a debt due from the acceptor to the drawer; that it was indorsed and delivered to the acceptor in order that he might get it discounted; and that he delivered it to the plaintiff upon condition, that if he procured cash for it, he might retain out of it the amount of the debt due to him from the acceptor; but that he never did get cash for the bill: Held, that the acceptor could not be examined to prove

15. Where the speaker of the House of Commons certified that a certain sum was due to *A. B.*, "a witness summoned by and on behalf of *C. D.*, one of the sitting *members for Dublin*, to give evidence before an election committee," the Court ordered judgment to be entered up against *C. D.* for that sum as upon a warrant of attorney, the certificate being held conclusive as to the fact of the witness having been summoned, and the statute 53 *G.* 3. *c.* 71. being held applicable to witnesses summoned by a sitting member as well as to those summoned by a petitioner. *Magrave* v. *White*, *T.* 9 *G.* 4. 412

16. An order of justices, requiring the stewards of a benefit society to re-admit *A. B.* who had been expelled, recited, that it had appeared to the justices that the rules of the society had been enrolled at the quarter sessions. On the trial of an indictment against the stewards for disobeying such order: Held, that the recital was not evidence of the enrolment of the rules. *Rex* v. *Gilkes and others*, *T.* 9 *G.* 4. 439

17. *A.* being tenant of premises under an indenture of lease granted by *B.*, a sequestration issued out of the Court of Chan-

D., mig
that th
to have
an answ
and an

18. In a
statute
a party
the ten
moval
to prev
training
on the
that th
tenant
moval,
to the
tenant.
Semb
far pens
an actio
a third
tenant
moval,
proof w
first se
T. 9 *G.*

19. In an
to bank
fidelity
receipt
by the
him in
as clerk
dence a

cution creditor authorized the bailiff to quit possession, the debtor consenting that he might return at any time and sell the goods. The bailiff accordingly gave up possession, and at the end of some months returned, and notice of sale was given. Before the sale, another fieri facias issued at the suit of a second creditor. To that writ the sheriff returned nulla bona. The second creditor brought an action for a false return, and recovered the value of the debtor's goods against the sheriff. The sheriff, having previously paid the value of such goods to the creditor under the first fi. fa., brought an action to recover from him that money: Held, that he was entitled to recover the same, unless it were shewn by the defendant, that at the time when the sheriff made the payment he was acquainted with the fact of the misconduct of his officer; and that, as between the sheriff and the execution creditor, the act of the bailiff was not to be considered the act of the sheriff, so as to fix the latter with the knowledge of the misconduct of his officer. *Crowder and Another* v. *Long, Gent., One, &c. M.* 9 *G.* 4. Page 598

21. Relief given to a pauper while he is residing out of the relieving parish, is primâ facie evidence of a settlement in that parish; and evidence of one instance in which relief was so given, was held to be sufficient to warrant a finding by the sessions that the pauper was settled in the relieving parish, although upon a second application relief had been refused. *The King* v. *The Inhabitants of Edwinstowe, M.* 9 *G.* 4. 671

22. Upon the trial of an appeal, the appellant having proved that the pauper occupied a tenement of 10*l.* per annum and paid rent for the same, the respondents, in order to shew that the pauper was not the sole tenant, attempted to prove by parol that the premises were let to the pauper and two other persons; but the witness, on cross-examination, having stated that the letting was by a written instrument, this Court held, that it could be proved only by the production of that instrument. *Rex* v. *The Inhabitants of Rawden, M.* 9 *G.* 4. Page 708

23. A cottage standing in the corner of a meadow (belonging to the lord of a manor), but separated from it and from a high road by a hedge, had been occupied for above twenty years without any payment of rent. The lord then demanded possession, which was reluctantly given, and the occupier was told that if he was allowed to resume possession it would only be during pleasure. He did resume, and keep possession for fifteen years more, and never paid any rent: Held, that the possession was not necessarily adverse, but might be presumed to have commenced by permission of the lord. *Doe dem. Thompson* v. *Clark, M.* 9. *G.* 4. 717

24. Where, in trover for copper ore, it was proved that the plaintiff was in possession of land in which he sunk a shaft and raised the ore in question, and the same witness, on cross-examination, proved that the ore was taken away by a person who had a shaft in an adjoining close, and who was getting the same lode of copper ore under the plaintiff's land, when he sunk his shaft: Held, that this was primâ facie evidence of the plaintiff's title

EXECUTOR.

FEME COVERT.

1. A married woman taken in execution, together with her husband, for a debt due from her before marriage, is not entitled to be discharged, unless it appears that she has no separate property; even although the husband has been discharged under the insolvent act. *Sparkes and Others* v. *Bell and Wife*, *E.* 9 *G.* 4. Page 1
2. A woman sued after her marriage as a feme sole having suffered judgment to go by default, and having been taken in execution, is not entitled to be discharged out of custody on the ground that she was a married woman, but must be left to her writ of error. *Moses* v. *Richardson*, *T.* 9 *G.* 4. 421

FEN LANDS.

See SETTLEMENT BY HIRING AND SERVICE, 5.

By statute 16 & 17 *Car.* 2., the trustees or adventurers for draining *Deeping Fen* were seised of 10,036 acres of land, and the rates and taxes for completing the drainage of the fen were to be levied on the 10,036 acres. They were called taxable lands. There were 5000 acres called free lands, and the other lands in the fen consisted of common land. The adventurers were at their own costs and charges to keep the river *Glen* with sufficient diking, roading, scouring, and banking. By a subsequent act of the 41 *G.* 3. reciting the former act, and that the works of drainage were insufficient, and that the owners and proprietors of free lands, and persons interested in the commons, notwithstanding their exemption from the costs of making works of drainage, together with the adventurers, being desirous to obtain a better drainage for all the said lands, and more effectually to protect the same from injury by a breach in any of the banks of the river, had agreed that the respective works of drainage thereinafter mentioned should be made, erected, maintained, and supported at the expense of the trusts, proprietors, and persons, in the proportions thereinafter mentioned. By a subsequent clause, the commissioners under that act were thereby required well and sufficiently to enlarge, deepen, and scour out the river, and straighten the course thereof where necessary, and enlarge and straighten the banks of the river in such manner as in the judgment of the commissioners should be requisite; and the costs of executing *all* the said works were to be paid and borne by the several persons then respectively liable to the repairs of such banks, in conjunction with the owners and proprietors interested in the drainage of the said commons, in such proportions as to the commissioners should seem just and equitable, and as they by their award should appoint, and such respective banks, after the commissioners should have completed the same, should from time to time be repaired by such persons as the commissioners should by their award direct: Held, that the adventurers were not, by this statute, released from the obligation imposed on them by the 16 & 17 *Car.* 2. of cleansing and scouring the river *Glen*. *Syson* v. *Johnson*, *M.* 9 *G.* 4. Page 795

over a road, described in the order as a new line of turnpike road. The sessions confirmed the order, subject to a case. This Court quashed the order of sessions, because it did not appear on the face of the order, or of the case, that the public had the same permanent right to pass over the new road as they had to pass along the old one.

Quære, Whether justices can divert a road for carriages, and continue it for foot-passengers? *Rex* v. *Winter*, *M.* 9 *G.* 4.

Page 785

HULL DOCK COMPANY.

See CORPORATION, 1.

HUNDRED, ACTION AGAINST.

A building intended for and constructed as a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements: Held, not to be a house, outhouse, or barn within the meaning of the stat. 9 *G.* 1. *c.* 22. *s.* 7., so as to entitle the owner to maintain an action against the hundred for an injury sustained by him in consequence of the malicious setting fire to the same. *Elsmore* v. *The Inhabitants of the Hundred of St. Briavells*, *T.* 9 *G.* 4. 461

INDICTMENT.

1. Where an indictment for a conspiracy alleged, "that at the court of quarter sessions, holden, &c. an indictment against *A. B.* was preferred to, and found by the grand jury:" Held, that this allegation must be proved by a caption regularly drawn up of record, and that the minute-book kept by the deputy clerk of the peace could not be received as evidence of the finding of the bill, although no record had been, in fact, drawn up. *Rex* v. *Smith and two Others*, *T.* 9 *G.* 4. P. 341
2. An indictment had been preferred against a county for not repairing a bridge, at the instance of the inhabitants of a parish; and the question intended to be tried was, Whether the inhabitants of the parish or of the county were liable to repair it? The Court refused to compel the inhabitants of the parish to allow the parties indicted to inspect the parish books and documents relating to the repair of the bridge. *Rex* v. *The Justices of the County of Buckingham*, *T.* 9 *G.* 4.

375

3. The statute 7 *G.* 4. *c.* 64. *s.* 23., which provides for the allowance of costs to prosecutors and witnesses in certain cases of misdemeanor, does not apply where the indictment has been removed into K. B. by certiorari. *Rex* v. *Richards*, *T.* 9 *G.* 4. 420
4. An order of justices requiring the stewards of a benefit society to re-admit *A. B.*, who had been expelled, recited that it had appeared to the justices, that the rules of the society had been enrolled at the quarter sessions. On the trial of an indictment against the stewards for disobeying such order: Held, that the recital was not evidence of the enrolment of the rules. *Rex* v. *Gilkes*, *T.* 9 *G.* 4. 439

INDORSEMENT.

See PARTNERSHIP, 3.

INFERIOR COURT.

See PRACTICE, 5.

IN-

R. H., at the time of committing the offence thereinafter mentioned, was a person employed in the service of the customs, and that it was the duty of him, as such person so employed in the service of the customs, to arrest and detain all such goods as should be imported, which upon such importation would become forfeited to the king by virtue of any act of parliament relating to the customs, and which would be liable to be seized; and that the defendant, well knowing, &c. unlawfully and corruptly solicited *R. H.* being such person so employed in the service of the customs, when certain goods should be imported, which upon importation would be liable to be seized or forfeited, to forbear to arrest and detain the same, &c.; Held, that inasmuch as it was not the duty of every person employed in the service of the customs to arrest and detain goods which would be liable to be seized as forfeited, this count was bad for want of shewing that *R. H.* was a person whose duty it was to arrest and detain such goods. *Rex* v. *Everett*, *E.* 9 *G.* 4.

Page 114

ILLEGAL AGREEMENT.

usual p
luggage
sited in
not in t
order h
it. *Ric*

INSO

See F

INSOLV

See

A., an ins
the Cou
vent de
out of c
brought
be exam
a credi
future d
rived, (
torney c
B.'s wi
from *A.*,
be the
tate, ar
out of t
in three
ment: I
was unm
insolven
Murray
&c., *T.*

til she had been moored in good safety twenty-four hours, arrived in the evening of the 18th of *February*, and the captain having orders to take her into the King's Dock at *Deptford*, moored her near the dock-gates. On the following morning he was informed at the dock, that no order for his admittance had been received; but that if it had, the vessel could not be then admitted, on account of the quantity of ice in the river. The order was sent by the Navy Board on the 21st, but on account of the ice the ship could not be moored until the 27th, and then in warping her towards the dock a rope broke, she grounded and was totally lost. The jury found that the vessel remained at her moorings from the 18th to the 27th of *February* on account of the ice, and not for want of an order to enter the dock: Held, that upon this finding the plaintiff was entitled to recover, for that the place where the vessel was moored not being the place of her ultimate destination, the policy did not expire when she had been there in safety twenty-four hours; and as the vessel remained at those moorings on account of the ice, and not waiting for the order, the underwriters were not discharged by the delay. *Samuel* v. *The Royal Exchange Assurance Company*, *E.* 9 *G.* 4. Page 119

2. Where a vessel insured in a valued policy of 2000*l.* received damage by perils of the sea, which could have been repaired for 1450*l.*, but the jury found that the vessel was not worth repairing: Held, that this was a total loss, and the assured were entitled to recover the sum at which the vessel was valued in the policy. *Allen* v. *Sugrue*, *M.* 9 *G.* 4. 561

3. It is the duty of a party effecting an insurance on life or property to communicate to the underwriters all material facts within his knowledge, touching the subject-matter of the insurance; and it is a question for the jury whether any particular fact was or was not material. *Lindenau* v. *Desborough*, *M.* 9 *G.* 4. Page 586

JOINT STOCK COMPANY.

A member of a joint stock company was employed by the company as their agent, to sell goods for them, and received a commission of two per cent. for his trouble, and one per cent. del credere for guaranteeing the purchaser. Having sold goods on account of the company, he drew on the purchaser a bill of exchange payable to his (the drawer's) own order, and after it had been accepted, he indorsed it to the actuary of the company, and the latter indorsed it to another member, who was the managing director, and who purchased goods for the company; the company were then indebted to him in a larger amount than the sum mentioned in the bill. The acceptor having become insolvent before the bill became due, the drawer received from him 10*s.* in the pound upon the amount of the bill, by way of composition: Held, first, that the indorsee being a member of the company could not sue the drawer on the bill, inasmuch as it was drawn by the latter on account of the company; and that he could not recover the sum received by the drawer on the bill, because that money must be taken to have been received by him in his character of a member of the company, and not on his own account.

See TRESPASS, 3.

JURISDICTION.

See JUSTICES, 6. PRACTICE, 1. 13.

JUROR.

Alienage is a ground of challenge to a juror, and if the party has an opportunity of making his challenge and neglects it, he cannot afterwards make the objection. *Semble*, That since the 7 *G.* 4. *c.* 60. *s.* 27. alienage is not a ground of challenge to a special juror. *Rex* v. *Sutton and Others*, *T.* 9 *G.* 4. 417

JUSTICES.

See RATE.

1. An order of justices made under the 5 *G.* 4. *c.* 71. stated, "that the justices, after due examination had on oath, *having adjudged* the legal place of settlement of a pauper lunatic confined in a lunatic asylum, to be in *M.*, did thereby require the churchwardens and overseers of *M.* to pay to the treasurer of the lunatic asylum 10*l.* 16*s.* due for twenty-four weeks' maintenance, &c., being at the rate of 9*s.* per week, and to pay the same weekly sum

that a
retro
it wa
Rex v
den, .
2. The
not t
justic
appea
lowin
rate,
the n
was
Septe
enter
sions.
give
try h
and t
matte
sessic
pract
notic
appe
when
it, or
have
at th
court
comp
Rex
9 *G.*
3. An
the a
to re
expe

order, that recital is not evidence of the enrolment of the rules. *Rex* v. *Gilkes and Others*, *T.* 9 *G.* 4. Page 439

4. By the statute 4 *G.* 4. *c.* 95. *s.* 87., a right of appeal is given in certain cases, if the party gives notice within six days after the cause of complaint arises. Two justices having made an order upon the surveyors of the roads in a township, to perform a certain part of the statute-duty on a turnpike-road running through the township, and to pay to the surveyor of that road a certain part of the money received as a composition for statute-duty: Held, that the cause of complaint did not arise until a copy of the order in writing had been served, and that notice of appeal given within six days from that time was valid. *Rex* v. *The Justices of Lancashire*, *M.* 9 *G.* 4. 593

5. By statute 6 *G.* 4. *c.* 108. *s.* 3., if any vessel therein described shall be found on the high seas, within 100 leagues of any part of the coasts of the United Kingdom, or shall be discovered to have been within the said distance, having on board the goods therein specified, the goods and the vessel shall be forfeited. By *s.* 49., every person who shall be found or discovered to have been on board any vessel liable to forfeiture under that act, for being found or discovered to have been within any of the distances or places mentioned in the act from the United Kingdom, shall forfeit 100*l.*, and may be detained and taken before two justices, to be dealt with as thereinafter mentioned. By *s.* 74., any offence against that act shall, for the purpose of prosecution, be taken to have been committed, and the penalties incurred at the place on land in the United Kingdom into which the person committing such offence, or incurring such penalty, shall be taken, brought, or carried; and in case such place or land is situate within any city, &c., the justices of the peace for the city, &c., as well as those for the county within which such city is situate, shall have jurisdiction to try all offences committed upon the high seas against the act. A vessel, liable to forfeiture under this act, was seized in a part of the river *Orwell* where the justices of *Ipswich* had jurisdiction, and a person found on board the vessel was taken to *Harwich*, and prosecuted before two justices of that place, who convicted him in a penalty of 100*l.* for having been found on the high seas on board a vessel liable to forfeiture: Held, that the justices of *Harwich*, being justices at the first place on land to which the party was carried, had jurisdiction to try the offence. *In the Matter of James Nunn*, *M.* 9 *G.* 4. Page 644

LANDLORD AND TENANT.

1. It was stated in a special verdict, that by an indenture *A.* demised to *B.* all that wharf next the river *Thames*, described by abutments, together with all ways, paths, passages, easements, profits, commodities, and appurtenances whatsoever, to the said wharf belonging, and that by the indenture, the exclusive use of the land of the river *Thames* opposite to and in front of the wharf, between high and low water mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf, but that the land

land itself between high and low water mark was not demised: Held, that the meaning of this finding either was, that the land was demised as appurtenant to the wharf, and then it would be a finding that one piece of ground was appurtenant to another, which in law could not be; or that the mere use of the land passed by the indenture, and that was a mere privilege or easement, out of which rent could not issue, and consequently that the lessor could not distrain, for rent in arrear, barges, the property of *B.*, lying in the space between high and low water mark, and attached to wharf by ropes. *Buszard and Others, Assignees,* v. *Capel and Another, E.* 9 *G.* 4. Page 141

2. By a memorandum of agreement, in consideration of the rent and *conditions* thereinafter mentioned, *A.* was to have, hold, and occupy, as on lease, certain premises therein specified, at a certain rent per acre. And it was *stipulated* that no buildings should be included or leased by virtue of the agreement; and it was further *agreed and stipulated*, that *A.* should take, at the rent aforesaid, certain other parcels, as the same might fall in; and, lastly, it was *stipulated and conditioned* that *A.* should not assign, transfer, or underlet any part of the said lands and premises, otherwise than to his wife, child or children: Held, that by the last clause a condition was created, for the breach of which the lessor might maintain an ejectment. *Doe on the demise of Henniker* v. *Watt, E.* 9 *G.* 4. 308

3. *A.* demised to *B.* the first and second floor of a house for a year, at a rent payable quarterly. During a current quarter, some dispute arising between the parties, *B.* told *A.* that she would quit immediately. The latter answered she might go when she pleased. *B.* quitted, and *A.* accepted possession of the apartments: Held, that *A.* could neither recover the rent, which, by virtue of the original contract, would have become due at the expiration of the current quarter; nor rent pro rata, for the actual occupation of the premises for any period short of a quarter. *Grimman* v. *Legge, T.* 9 *G.* 4. Page 324

4. Where a landlord's agent went upon the tenant's premises, walked round them, and gave a written notice that he had distrained certain goods lying there for an arrear of rent, and that unless the rent was paid, or the goods replevied within five days, they would be appraised and sold, and then went away, not leaving any person in possession: Held, that this was a sufficient seizure to give the tenant a right of action for an excessive distress; and that quitting the premises without leaving any one in possession was not an abandonment of the distress, the 11 *G.* 2. *c.* 19. *s.* 10. giving the landlord power to impound, or otherwise secure on the premises goods distrained for rent in arrear. *Swann* v. *The Earl of Falmouth, T.* 9 *G.* 4. 456

5. *A.* being tenant of premises under an indenture of lease granted by *B.*, a sequestration issued out of the Court of Chancery against the latter. *A.* signed the following instrument:—"I hereby attorn, and become tenant to *C.* and *D.*, two of the sequestrators named in the writ of sequestration issued in the said suit in chancery, and to hold the same for

for such time and on such conditions as might be subsequently agreed upon:" Held, that this was an agreement to become tenant, and required a stamp. Held, secondly, that the defendant, not having received possession of the premises from *C.* and *D.*, might dispute their title, and that the lease not being proved to have been surrendered was an answer to the action. *Cornish* v. *Searell*, *T.* 9 *G.* 4. Page 471

6. In an action founded on the statute 11 *G.* 2. *c.* 19. *s.* 3. against a party for aiding and assisting the tenant in the fraudulent removal of his goods, with intent to prevent the landlord from distraining them, it is incumbent on the landlord not only to prove that the defendant assisted the tenant in such fraudulent removal, but also that he was privy to the fraudulent intent of the tenant.

Semble, That the statute is so far penal, that it is incumbent, in an action by the landlord against a third party for assisting the tenant in such fraudulent removal, to bring the case by strict proof within the words of the first section. *Brooke* v. *Noakes*, *T.* 9 *G.* 4. 537

LAND-TAX.

See Distress, 3.

LEASE.

See Ejectment, 3.

LIBEL.

A. having discharged his servant, and hearing that he was about to be engaged by *B.*, wrote a letter to *B.*, and informed him that he had discharged him for misconduct. *B.* in answer desired further information. *A.* then wrote a second letter to *B.*, stating the grounds on which he had discharged the servant. In an action by the servant against *A.* for a libel contained in this letter, it was held, that, assuming the letter to be a privileged communication, it was properly left to the jury to consider whether the second letter was written by *A.* *bonâ fide*, or with an intention to injure the servant. *Pattison* v. *Jones*, *M.* 9 *G.* 4. Page 578

LICENCE BY PAROL.

See Rector.

LIEN.

A., *B.*, and *C.*, together with others, were part owners of a ship engaged in the whale-fishery. The usual mode of managing the cargo was, that on the arrival of the vessel at her homeward port, the whalebone was taken into the possession of *B.* and sold by him, and the proceeds were applied towards the discharge of the expences of the ship. The blubber was deposited in a warehouse rented of *C.* by the owners of the ship, and the oil produced from it was then put into casks, each owner's share being weighed out, and placed separately in the warehouse in casks marked with his initials. After the division, the practice was for the warehouseman to deliver to the order of each part-owner his share of the oil, unless notice was given by the ship's husband that the part-owner's share of the disbursements had not been paid. In that case, the warehouseman used to detain the oil till the ship's husband's demand had been satisfied. The ship having arrived from her voyage in 1825,

remained in the warehouse at the time of his bankruptcy. In *January* 1826, the warehouseman had orders from *C.*, the ship's husband, not to deliver to *A.* the remaining oil, as his share of the disbursements of the ship had not been paid: Held, in an action of trover brought by the assignees of *A.* against *C.* for the residue of *A.*'s oil, that the other part-owners had originally a lien on it for his share of the disbursements of the ship, and that this right was not divested by the separation of *A.*'s share from the residue and placing it in casks marked with his name. *Holderness and Another, Assignees,* v. *Shackels, M.* 9 *G.* 4.

Page 612

LIMITATIONS, STATUTE OF.

1. To an action upon a joint and several promissory note of *A.* and *B.* (the latter being a mere surety), brought by payee against the administrator of *B.*, the defendant pleaded, that the cause of action did not accrue within six years; upon which the plaintiff took issue. The plaintiff proved, that within six years and during the lifetime of *B.* *A.*

PARISH HOUSE.

See Poor, 1.

PARTNERSHIP.

See Deed, 1.

or notes for the accommodation of others, and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here." *A.*, *B.*, and *C.*, in order to obtain consignments from *America*, made advances or granted drafts or bills of exchange, or indorsements of them to their principals, on the security of the goods consigned. In order to obtain a consignment from *W.*, *C.*, in his own name, indorsed bills for him, which were to be provided for by others drawn by *W.* on *A.*, *C.*, and Co. in *England*, which were to be provided for by the proceeds of the consignment. Before the latter bills were presented for acceptance, *A.* and *B.* had become bankrupts: Held, that the indorsement of the bills by *C.* must be considered as an indorsement by the firm, and that they were liable upon those bills. *South Carolina Bank* v. *Case*, *T.* 9 *G.* 4. Page 427

PARTY WALL.

The common user of a wall separating adjoining lands, belonging to different owners, is primâ facie evidence that the wall, and the land on which it stands, belongs to the owners of those adjoining lands in equal moities, as tenants in common.

Where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, and a new wall was built of a greater height than the old one, it was held that this was not such a total destruction of the wall as to entitle one of the two tenants in common to maintain trespass against the other. *Cubitt* v. *Porter*, *E.* 9 *G.* 4. Page 257

PATRONAGE.

See MANDAMUS, 1.

PENAL ACTION.

See LANDLORD AND TENANT, 6. OVERSEER, 3.

PHEASANTS.

See GAME.

POOR.

Where a pauper, who had been permitted to occupy a parish house, went away from home: Held, that the overseers might lawfully enter and resume possession, without giving any notice to quit, and were not bound to pursue the mode pointed out by the 59 *G.* 3. *c.* 12. *s.* 24. *Wildbor* v. *Rainforth and Another*, *E.* 9 *G.* 4. 4

POOR-RATE.

See APPEAL. OVERSEER, 3.

1. The 7 *G.* 3. *c.* 37., which enacts that certain lands to be embanked from the river *Thames* shall be "free from all taxes and assessments whatsoever," exempts the occupiers of premises built on those lands from payment of poor-rates in respect of such occupation. *Rex* v. *The London Gas Light and Coke Company*, *E.* 9 *G.* 4. 54
2. On the hearing of an appeal against a poor-rate, the sessions have no jurisdiction to quash the rate for a defect appearing on the face of the rate itself, unless that

that defect be specified in the notice as a cause of appeal. *Rex* v. *The Inhabitants of Bromyard*, *E.* 9 *G.* 4. Page 240

POWER OF ATTORNEY.

See STAMP, 5.

Debt lies on the decree of a colonial court, made for payment of the balance due on a partnership account. One of the partners gave his son a power of attorney "to act on his behalf in dissolving the partnership, with authority to appoint any other person he might see fit: Held, that this gave the son a power to submit the accounts to arbitration. *Henley* v. *Soper the Elder*, *E.* 9 *G.* 4. 16

PLEADING.

1. Where defendant pleaded, by way of set-off, a bond given to him by the plaintiff conditioned to pay an annuity to a third person, which had been previously granted by the defendant, which defendant was before liable to pay, and to indemnify defendant therefrom: Held, that the defendant was not bound to prove damage; but that the plaintiff, in order to discharge himself, was bound to prove payment of the annuity, in the same manner as if he had been sued in the bond. *Penny and Another, Assignees*, v. *Foy*, *E.* 9 *G.* 4. 11
2. An information stated, that certain goods were about to be imported into *Great Britain* from parts beyond the seas, in respect of which certain duties would be payable; and that one *R. H.*, at the time of committing the offence thereinafter mentioned, was a person employed in the service of the customs, and that it was the duty of him, as such person so employed in the service of the customs, to arrest and detain all such goods as should be imported, which, upon such importation, would become forfeited to the king, by virtue of any act of parliament relating to the customs, and which would be liable to be seized; and that the defendant, well knowing, &c. unlawfully and corruptly solicited *R. H.*, being such person so employed in the service of the customs, when certain goods should be imported, which, upon importation, would be liable to be seized or forfeited, to forbear to arrest and detain the same, &c.: Held, that inasmuch as it was not the duty of every person employed in the service of the customs to arrest and detain goods which would be liable to be seized as forfeited, this count was bad for want of shewing that *R. H.* was a person whose duty it was to arrest and detain such goods. *Rex* v. *Everett*, *E.* 9 *G.* 4. Page 114
3. In an action against the marshal for an escape, the declaration alleged, that the plaintiff and *W. B.* having divers disputes, by mutual bonds of submission, referred them to the arbitration of *C.* and *D.* That an award was made, ordering *W. B.* to pay the plaintiff a certain sum of money, on, &c.; and, because the award was not performed, the plaintiff sued out, and prosecuted out of the Court of Common Pleas a writ, commanding defendant to attach *W. B.* (then being in his custody), so that he might have his body before the justices of Common Pleas, on, &c. to answer, &c.; and *W. B.*, being and remaining in the custody of the defendant

defendant as such marshal, by virtue of the attachment, on, &c. was brought before Sir *S. G.*, a Judge of Common Pleas, at his chambers by writ of habeas corpus, and by him committed to the custody of the warden of the *Fleet*, and afterwards was brought before Sir *J. L.*, a Judge of King's Bench, at chambers, and by him committed to the custody of the defendant charged with the attachment; and that the defendant afterwards suffered him to escape: Held, that the plaintiff was bound to prove the execution of the bond of submission by himself as well as by *W. B.* Semble, That he need not have done so had he alleged and proved a rule of the Common Pleas ordering the issuing of the attachment, although proof of such rule, without a statement in the declaration, would not be sufficient.

Quære, Whether the commitment by a judge at chambers was legal? *Brazier* v. *Jones*, *E.* 9 *G.* 4. Page 124

4. By a deed, *B.* for himself, his heirs, executors, and administrators, covenanted that for and notwithstanding any act done by him (*B.*), it should be lawful for *A.* to receive the money, debts, and premises thereby assigned, without any let, suit, interruption, or denial of *B.*, his executors or administrators, or any person claiming under him or them: Held, that the words "for and notwithstanding any act done by *B.*," being inconsistent with the subsequent part of the covenant, ought to be rejected, and, therefore, that it was a sufficient breach of that covenant to allege a receipt of the money by the executor of *B.* in respect of the contracts mentioned in the indenture. *Belcher* v. *Sikes*, *E.* 9 *G.* 4. Page 185

5. To a declaration in trover by an administrator, alleging the grant of letters of administration to the plaintiff, and that the defendant, knowing the goods to have been the property of the intestate in his lifetime, and of the plaintiff as administrator since his death, *afterwards*, and after the death of the intestate, to wit, &c. converted the same goods. A plea of not guilty of the premises within six years is bad upon special demurrer. *Pratt* v. *Swaine*, *E.* 9 *G.* 4. 285

6. Declaration upon a bill of exchange drawn on the 29th of *November* 1827, payable two months after date, was entitled generally of *Hilary* term 1828: Held, that it was competent to the plaintiff to prove by the parol evidence of the attorney (without producing the writ), that the action was commenced after the 1st of *February*, when the bill became due. *Lester* v. *Jenkins*, *T.* 9 *G.* 4. 339

7. Where an indictment for a conspiracy alleged, that "at the court of quarter sessions holden, &c. an indictment against *A. B.* was preferred to and found by the grand jury:" Held, that this allegation must be proved by a caption regularly drawn up of record, and that the minute-book kept by the deputy clerk of the peace could not be received as evidence of the finding of the bill, although no record had been in fact drawn up. *Rex* v. *Smith and Two Others*, *T.* 9 *G.* 4. 341

8. Information for usurping the office of jurat of the borough of *Q.* Plea, that the borough of *Q.* was a free borough; and that the burgesses of the borough were

were a body corporate, consisting of the mayor, bailiffs, and burgesses of the borough; and that by charter it was granted that the mayor, bailiffs, and burgesses, by whatever name they had before been incorporated, should thereafter be a body corporate by the name of "mayor, jurats, bailiffs, and burgesses;" that there should be one of the more honest and discreet burgesses or inhabitants called "mayor," to be elected as therein mentioned, and four honest and discreet burgesses or inhabitants called jurats, and two other honest and discreet burgesses *or* inhabitants called "bailiffs;" that the jurats and bailiffs should hold their offices for life, unless removed for reasonable cause; and whenever it should happen that either or any of the jurats or bailiffs for the time being should die, or be removed or withdrawn from his or their office or offices, it should be lawful for the surviving and remaining jurats and bailiffs for the time being, or the greater part of them (of whom the mayor should be one), within convenient time to nominate another or others of the burgesses *or* inhabitants of the borough for the time being to be a jurat or jurats, bailiff or bailiffs of the borough. The plea then stated a vacancy in the office of jurat, and that the defendant, being an inhabitant of the borough, was duly elected to be a jurat. Replication, first, putting in issue the due election of the defendant; and, secondly, that from the time of granting the charter, hitherto it had been used and accustomed within the borough, that every inhabitant of the borough, elected to be a jurat, before he took upon himself the office of jurat, should be sworn and admitted a free burgess of the borough, and that the defendant before he took upon himself the office of jurat, had not been admitted and sworn a burgess. Demurrer, upon the trial of the issues in facts, it appeared that at the election of the defendant, there were present the mayor, two bailiffs, and two jurats: Held, that the election was valid, for the general rule that a majority of each definite part of the elective body should be present at the election, could not apply to this corporation; because, in the event of the death or removal of one of the bailiffs, it would be impossible that at the election of a new bailiff there should be present a majority of the bailiffs.

Held, upon demurrer to the replication, that according to the true construction of the charter, it was competent to the corporation to elect the jurats from the inhabitants of the borough, or from the burgesses; and, therefore, that the plea was good, inasmuch as it shewed that the defendant was an inhabitant of the borough at the time when he was elected to the office of jurat. *Rex* v. *Greet*, *T.* 9 *G.* 4.

Page 863

9. The indorsee of a bill of exchange, dishonoured by the acceptor, being ignorant of the place of residence of one of the indorsers, employed an attorney to give notice to the prior indorsers; the attorney, after enquiry, having received information of the indorser's place of residence, on the following day consulted his client, and on the third day sent notice to the indorser:

dorser: Held, that the notice was sufficient.

The declaration averred that the defendant had notice: Held, that that allegation was satisfied by proof that he had notice as soon as it could reasonably be given; and that it was unnecessary, therefore, to state in the declaration the special circumstances which rendered valid the notice given at a later period than in ordinary cases would be sufficient. *Firth* v. *Thrush*, *T.* 9 *G.* 4. Page 387

10. Covenant against the assignee of the lessee, for non-payment of rent. Plea, that before the rent became due, the defendants assigned all their estate and interest in the demised premises to *A. B.* Replication, that in and by the indenture the lessee for himself, his executors, administrators, and assigns, covenanted that he, his executors or administrators, should not assign the premises thereby demised without the consent of the lessor, and that no consent was given: Held, upon demurrer, first, that the replication was bad, inasmuch as the covenant of the lessee not to assign did not estop the assignee from setting up the assignment; and, secondly, that the action being founded on priority of estate, the liability of the defendant ceased as soon as the privity of estate was destroyed. *Paul and Others* v. *Nurse and Others*, *T.* 9 *G.* 4. 486

11. A suit commenced in K. B. by latitat, may be well continued by a bill of *Middlesex*, sued out by the plaintiff, with intent to implead the defendant for the same causes of action. *Page* v. *Newman*, *T.* 9 *G.* 4. 489

12. Trespass for mesne profits. Plea, a judgment recovered by the defendant, in 1822, against *A.*; an elegit sued out thereon; an inquisition held, whereby it was found, that *A.* at the time when the judgment was recovered was seised for life of (inter alia) the premises mentioned in the declaration, and that the sheriff delivered those premises to the defendant. Replication, that in 1820, *A.*, by indenture, bargained and sold, inter alia, the premises mentioned in the declaration to the plaintiff; that he entered and continued in possession until the committing of the trespasses. The defendant craved oyer of the indenture; and it thereby appeared, that, for the purpose of securing an annuity to *B.*, *A.* in 1819 had conveyed the premises in the declaration mentioned to *B.*, for 100 years; and that, subject thereto, he conveyed them to the plaintiff for better securing a second annuity granted by the deed. Upon demurrer, the replication was held to be good, inasmuch as it shewed that the plaintiff was in possession at the time when the trespass was committed; that *A.* had no interest in the premises at the time when the judgment was obtained against him; that the defendant consequently could derive no title from him, and that he was a wrongdoer. *Chatfield* v. *Parker*, *T.* 9 *G.* 4. Page 543

13. Where the assignees of a bankrupt enter the premises of a third person to seize goods, which were the property of the bankrupt, it is not necessary that an action against them should be brought within three months after the fact committed, the act of the assignees not being done "in pursuance of the statute," within the meaning of the 6 *G.* 4. *c.* 16. *s.* 44. *Edge* v. *Parker*, *Mich.* 9 *G.* 4. 697

14. Where

14. Where a declaration alleged that defendant was assistant overseer, that a rate for the relief of the poor was made and duly allowed; and although defendant, as such assistant overseer, had the rate in his possession, and although plaintiff at a reasonable time demanded an inspection of it, and tendered 1*s.*, yet defendant refused to produce it, whereby he forfeited 20*l.*: Held, on motion in arrest of judgment, that the count was sufficient; for if the defendant had the rate in his custody *as* assistant overseer, it might be presumed that it was his duty to produce it when lawfully demanded. *Bennett* v. *Edwards*, *M.* 9 *G.* 4. Page 702

PRACTICE.

See Arrest. Trial at Bar.

1. Where upon an appeal against an order of removal, the justices at sessions were equally divided, and made an order that the hearing of the appeal should be adjourned. One of the justices, who voted in favour of the respondent parish was a rated inhabitant of that parish. An application for a certiorari to remove the order of sessions, in those facts are disputed, they will direct an issue to try the question of the fraud. *Harrod* v. *E. H. Benton*, *E.* 9 *G.* 4. Page 217

3. The Court will not compel an attorney to pay a sum of money he has received in his character of attorney, he having after the receipt of the money become bankrupt and obtained his certificate. *Exparte Culliford* v. *Warren, Gent., One, &c. E.* 9 *G.* 4. 220

4. Where a defendant obtains a mandamus under 13 *G.* 3. *c.* 63. *s.* 44. for examining witnesses in *India*, the plaintiff, gaining the cause, is entitled to the costs of cross-examining those witnesses. *Whytt* v. *Macintosh*, *E.* 9 *G.* 4. 317

5. Where a cause has been sent back by procedendo to an inferior court, this Court will not quash the writ, on the ground that the cause is important and fit to be tried in the superior court. *Hayward* v. *Wright*, *T.* 9 *G.* 4. 386

6. Where there is not, in fact, any cause in court, an affidavit entitled "In the King's Bench," but not in any cause, is sufficient. *Ex parte Gregory*, *T.* 9 *G.* 4. Page 409

error. *Moses* v. *Richardson*, *T.* 9 *G.* 4. Page 421

9. After a verdict for a defendant, the Court made a rule absolute for a new trial, and ordered that the costs of the former trial should abide the event of such new trial. The record was carried down to the Spring assizes following, when it was made a remanet. It was tried a second time at the Summer assizes, when a verdict was again found for the defendant. The Court afterwards ordered, that that verdict should be set aside, and a new trial had between the parties upon payment of the costs of the last trial, and that the costs of the first trial should abide the event of such new trial. Upon the third trial a verdict was found for the plaintiff: Held, that the plaintiff was entitled to costs occasioned by the cause having been made a remanet at the assizes next following the term, when the first rule was made absolute for a new trial. *Gibbins and Another, Assignees*, v. *Phillips*, *T.* 9 *G.* 4. 437

10. A creditor had obtained judgment by default against his debtor since the statute 6 *G.* 4. *c.* 16. *s.* 108., and the goods having been seized by the sheriff before, yet notsold until after, an act of bankruptcy was committed by the debtor, the Court refused to compel the sheriff to pay over the proceeds of the sale to the assignees of the bankrupt. *In re Washbourn*, *T.* 9 *G.* 4. 444

11. A suit commenced in K. B. by latitat may be well continued by a bill of *Middlesex*, sued out by the plaintiff with intent to implead defendant for the same causes of action. *Page* v. *Newman*, *T.* 9 *G.* 4. 489

12. A defendant, having been arrested, paid into Court the sum indorsed on the writ, together with 20*l.* as a security for costs, pursuant to the statute 7 & 8 *G.* 4. *c.* 71. *s.* 2. The Court, on the application of the defendant, allowed the plaintiff to take out of Court a given portion of the sum paid into Court; and unless he consented to accept thereof with costs, in full discharge of the action, ordered it to be struck out of the declaration, and that the plaintiff should not give any evidence at the trial as to that sum. *Hubbard* v. *Wilkinson*, *T.* 9 *G.* 4. Page 496

13. Where a Judge's order for taxing an attorney's bill is not obtained until after he has commenced an action for the amount, the defendant is not entitled to the costs of taxation, although more than one sixth is taken off by the Master. *Jay, Gent., One, &c.*, v. *Coaks*, *M.* 9 *G.* 4. 635

14. Where in an action commenced in the Palace Court, and afterwards removed into K. B., the plaintiff recovers less than the sum for which he held the defendant to bail, the Court of K. B. has no power to allow the defendant his costs under the statute 43 *G.* 3. *c.* 46. *s.* 8. *Handley* v. *Levy*, *M.* 9 *G.* 4. Page 637

15. An affidavit of debt, stating that the defendant was indebted to the plaintiff as liquidator (duly appointed by the law of *France*) of an estate, is irregular unless it shew that by the law of *France* a liquidator is entitled to sue. *Tenon* v. *Mars*, *M.* 9 *G.* 4. 638

16. The defendant is not entitled to costs of a judgment of non pros obtained by reason of the plaintiff having omitted to enter the issue on record, after issue joined

A rate n
rate n
upon-
not su
the pe
land,
buted
county
within
county
ever b
the co
out of
to whi
county
v. *The*
Tweed

Where a
parol, l
parish
tain co
should
the vau
the. les
vault a
there:
be mai
doing;
power
of a va
parol.
Sem
grant

REMANET.

See PRACTICE, 8.

RESTRICTIVE INDORSEMENT.

See BILL OF EXCHANGE, 6.

RESIANT.

See COLLECTOR.

SCOTCH COURT.

See FOREIGN JUDGMENT.

SEQUESTRATION.

See LANDLORD AND TENANT, 5.

SET-OFF.

See BANKRUPT, 1. EVIDENCE, 1. PLEADING, 1.

SETTLEMENT — *by Apprenticeship.*

1. The parish officers of *A.* bound a pauper apprentice to his grandfather, who represented himself as a butcher. Indentures were executed with the sanction of two justices. The grandfather, in fact, did not carry on the trade of a butcher, but he and the mother colluded together, and fraudulently imposed him on the justices and the parish officers, as a proper master for the pauper: Held, that there having been no fraud in the parish officers, the pauper gained a settlement by serving under this indenture. *Rex* v. *The Inhabitants of Great Sheepy, E.* 9 *G.* 4. Page 74
2. The father of a pauper was about to put him out to service, when it was suggested to him by *A.*, a carpenter, that it would be better for the pauper to learn his (*A.*'s) trade, instead of going to service, and *A.* afterwards hired the pauper to learn his trade and to do any other work, as well as that of a carpenter. The pauper went to *A.* and served him for five years, living during that time with his parents, who provided him with victuals and part of his clothing, the remainder being provided by *A.* The pauper did any work his master ordered him to do, and at the end of that time he agreed to work for the master as a journeyman, at weekly wages. The sessions having found that this was a defective contract of apprenticeship, and not a contract of hiring, this Court confirmed the order of sessions. *Rex* v. *The Inhabitants of Combe, E.* 9 *G.* 4. Page 82
3. The master of a parish apprentice, not having work sufficient for him, proposed to him to go to a farm in a different parish, occupied by the master's sister. The pauper assented to the proposal, and agreed with her to work there for a twelvemonth for his meat and drink. He worked for her for four years and four months. During the first two years he received from her meat and drink. During the third and fourth, he received wages: Held, first, that no settlement was gained by the service with the sister, the service not being under the indentures: Held, secondly, that there had been a putting away of the apprentice without the consent of the justices, within the meaning of the statute 56 *G.* 3. *c.* 139. *s.* 9. and that the pauper did not by his service with the sister gain any settlement by hiring

ing and service. *Rex* v. *The Inhabitants of Shipton*, *E.* 9 *G.* 4. Page 88

4. The mother of a pauper stated that about twenty-four years ago she received money from the parish officers of *S.* to put her son out apprentice, and that she accordingly put him out; that the indenture was signed by her, the pauper, the master, and by a witness; that she gave it to the wife of a market-gardener, who attended the market of *S.*, to take to the overseers of the parish of *S.*; that the market-gardener and his wife were both dead, the latter having survived her husband; that she did not know whether the market-gardener's wife had left any will, but had heard that she had. Evidence was then given that search had been made in the parish chest of *S.* for the indenture, and that it could not be found: Held, that as it was the duty of the overseers, if the indenture had come into their possession, to deposit it in the parish chest, the presumption was, that it was lost or destroyed; and, therefore, that secondary evidence of the execution and contents of the indenture was admissible. *Rex* v. *The Inhabitants of Stourbridge*, *E.* 9 *G.* 4. 96

5. An indenture, by which an apprentice was bound for seven years, to serve *A. B.* for the first four years, and his own father for the last three, to learn two different trades, is a valid indenture, and requires only one stamp. *Rex* v. *The Inhabitants of Louth*, *E.* 9 *G.* 4. 247

6. The stat. 28 *G.* 3. *c.* 48. *s.* 4. makes void all indentures whereby children under eight years of age are bound apprentice to chimney sweepers, and no settlement can be gained by serving under them. *Rex* v. *The Inhabitants of Hipswell*, *T.* 9 *G.* 4. Page 466

7. Before the execution of an indenture, the master said that the intended apprentice should have better clothes. The apprentice then applied to the parish officers, who agreed to give him 2*l.* on the execution of the indenture, for the purpose of buying clothes, which they did accordingly: Held, that the money paid by the parish officers was an expense incurred by reason of an indenture of apprenticeship, within the meaning of the 56 *G.* 3. *c.* 139. *s.* 11., and, therefore, that the indenture required the assent of two justices. *Rex* v. *The Inhabitants of Mattishall*, *M.* 9 *G.* 4. 783

8. The statute 56 *G.* 3. *c.* 139. *s.* 2. enacts, that in all cases where the residence or establishment of business of the person to whom any child shall be bound, shall be within a different county from that within which the place by the officers whereof such child shall be bound shall be situated, and in all other cases where the justices of the peace for the district or place within which the place by the officers whereof such child shall be bound shall be situated, and who shall sign the allowance of the indenture by which such child shall be bound, shall not have jurisdiction, every indenture by which such child shall be bound shall be allowed, as well by two justices of the peace for the county or district within which the place by the officers of which such child shall be bound shall be situated, as by two justices of the peace for the county or district within which the place shall be situated wherein such child shall be intended to serve:

serve: Held, that in such case the indenture must be allowed by four distinct persons, two of them being justices of the county from which the apprentice is to be bound; and the other two being justices of the county into which he is to be bound. *Rex* v. *Shipton, M.* 9 *G.* 4. Page 774

SETTLEMENT — *by Emancipation.*

A pauper, while he was under age, quitted his parents and went to sea, serving sometimes in a king's ship, at other times in trading vessels, and remained in such service, and so separated from his father's family, when he attained the age of twenty-one years: Held, that he was then emancipated, and that his settlement did not afterwards shift with that of his father. *Rex* v. *The Inhabitants of Lawford, E.* 9 *G.* 4. 271

SETTLEMENT — *by Estate.*

A man living in parish *A.* under a certificate from parish *B.* cannot gain a settlement in the former parish by purchasing an estate for money. *Rex* v. *The Inhabitants of Great Driffield, M.* 9 *G.* 4. 684

SETTLEMENT — *by Hiring and Service.*

1. Where it was made a question of fact at the sessions whether there was a hiring and service for a year in the appellant parish, and the sessions confirmed the order of removal subject to the opinion of this Court as to a settlement being gained there by hiring and service: Held, that this amounted to a finding by the justices at sessions that there was a hiring and service for a year in that parish, and that such finding ought not to be disturbed by this Court, if there were any premises to warrant it. *Rex* v. *The Inhabitants of St. Andrew the Great, Cambridge, M.* 9 *G.* 4. Page 664
2. Where the court of quarter sessions have found, upon a case stated, that there was no general hiring, this Court will not disturb their decision if there appear to have been any premises to warrant it. *Rex* v. *The Inhabitants of Rotliston, M.* 9 *G.* 4. 668
3. Where the court of quarter sessions have, from facts proved before them, drawn the conclusion that there was an implied hiring for a year, this Court will not, upon a case sent to them by the sessions stating those facts, disturb that decision, if there appear any premises whatever to warrant it. *Rex* v. *The Inhabitants of St. Martin, Leicester, M.* 9 *G.* 4. 774
4. A hiring at so much per week, a month's wages or a month's warning, is a hiring for a year. *Rex* v. *St. Andrew's, in Pershore, Worcestershire, M.* 9 *G.* 4. 679
5. By an act of parliament passed for draining certain fen lands, 5000 acres of the said fen lands were vested in certain trustees as a recompence to the undertakers; and it was enacted, that all the inhabitants that might be thereafter upon any part of the land so allotted to the trustees, and were not able to maintain themselves, should be maintained by the said trustees, their heirs, &c., and never become chargeable to all or any of the respective parishes wherein such inhabitants should reside: Held, that the lands so vested in the trustees were not thereby made extra-parochial,

the requisites of the statute 59 *G.* 3. *c.* 50. had been complied with, and that he gained a settlement in the parish of *A.* by renting a tenement. *Rex* v. *The Inhabitants of Barham, E.* 9 *G.* 4. Page 100

4. Since the 59 *G.* 3. *c.* 50., a settlement may be gained by a residence of forty days in the parish, provided the party comply with the conditions mentioned in that act. And, therefore, where a pauper since that statute hired land for a year, at the sum of 10*l.*, and paid that rent, and occupied the land for the whole year, but resided only forty days in the parish, and not upon the land, it was held that he gained a settlement. *Rex* v. *The Inhabitants of Wainfleet, All Saints, E.* 9 *G.* 4. 227

5. Upon the trial of an appeal, the appellant having proved that the pauper occupied a tenement of 10*l.* per annum, and paid rent for the same, the respondents, in order to shew that the pauper was not the sole tenant, attempted to prove by parol that the premises were let to the pauper and two other persons; but the witness on cross-examination having stated that the letting was by a written instrument, it was held that it could be proved only by the production of that instrument. *Rex* v. *The Inhabitants of Rawden, M.* 9 *G.* 4. 708

SETTLEMENT — *by serving an Office.*

An assistant overseer, elected and appointed under the provision of the statute 59 *G.* 3. *c.* 12. at an annual salary of 10*l.*, will gain a settlement by serving such an office for a year. But the appointment in writing, under the hands and seals of the justices, to such an office, with an annual salary annexed to it, requires a stamp of 2*l.* *Rex* v. *The Inhabitants of Lew, M.* 9 *G.* 4. Page 655

SHERIFF.

1. In *March* the then sheriff of *London* seized the goods of a debtor by virtue of a fieri facias. An officer was put into possession of the goods, but the execution creditor directed the sheriff not to sell, and the debtor continued to have the controul of his goods until *November*, when another execution creditor sued out a fieri facias, directed to the succeeding sheriffs of *London*: Held, that the latter were bound to levy under this second fieri facias, and that it was their duty, when they found the officer of the former sheriff in possession, to enquire into the facts, and if they had done so they would have learnt that the first execution was fraudulent. *Lovick* v. *Crowder, E.* 9 *G.* 4. 132

2. Where a creditor obtained judgment by nil dicit against a trader, and thereupon issued a fi. fa., under which the sheriff seized the goods of the trader, who afterwards and before the goods were sold committed an act of bankruptcy, upon which a commission issued and he was duly declared a bankrupt, of which the sheriff had notice, but nevertheless sold the goods and paid over the proceeds to the execution creditor: Held, that he was not justified in paying over the money, and was liable to be sued for it by the assignees in an action for money had and received.

Quære, Whether the sheriff was justified in selling the goods after

SHIP-OWNER.

See CHARTER-PARTY.

SIMONY.

SPEAKER'S CERTIFICATE.

See EVIDENCE, 15.

SPECIAL VERDICT.

See DISTRESS, 1.

STAKEHOLDER.

STAMP.

1. A promissory-note for 11*l.*, payable to *A. B.* on demand, is a promissory-note payable to bearer on demand within the meaning of the 55 *G.* 3. *c.* 184., and requires a stamp of two shillings. *Keates* v. *Whieldon*, *E.* 9 *G.* 4. Page 7

2. A witness called to prove the receipt of a sum of money, was shewn an acknowledgment of the receipt of such money signed by himself; and, on seeing it, said that he had no doubt he had received it, although he had no recollection of the fact: Held, that this was sufficient parol evidence of the payment of the money; and that the written acknowledgment having been used to refresh the memory of a witness, and not as evidence of the payment, did not require any stamp. *Maugham* v. *Hubbard and Robinson, Assignees*, *E.* 9 *G.* 4. 14

3. An indenture by which an apprentice was bound for seven years, to serve *A. B.* for the first four years, and his own father for the last three, to learn two different trades, is a valid indenture, and requires only one stamp. *The King* v. *The Inhabitants of Louth*, *E.* 9 *G.* 4. 247

4. *A.* being tenant of premises under an indenture of lease granted by *B.*, a sequestration issued out of the Court of Chancery against the latter. *A.* then signed the following instrument: "I hereby attorn and become the tenant to *C.* and *D.*, two of the sequestrators named in the writ of sequestration issued in the said suit in Chancery, and I hold the same for such time and on such conditions as may be subsequently agreed upon: Held, that this was an agreement to become tenant, and required a stamp: Held, secondly, that the defendant not having received possession of the premises from *C.* and *D.* might dispute their title, and that the lease not being proved to have been surrendered, was an answer to the action. *Cornish* v. *Searell*, *T.* 9 *G.* 4. Page 471

5. Where the members of a mutual insurance club all executed the same power of attorney, severally authorizing the persons therein named to sign the club policies for them: Held, that it required only one stamp. *Allen and Another, Assignees*, v. *Morrison*, *M.* 9 *G.* 4. 565

6. The appointment in writing under the hands and seals of two justices, to the office of assistant overseer, with an annual salary of 10*l.* annexed to it, requires a stamp of 2*l.* *Rex* v. *The Inhabitants of Kew*, *M.* 9 *G.* 4. 655

STATUTE DUTY.

See APPEAL, 3.

SUMMONS.

See COMMISSIONERS OF BANKRUPT.

SURETY.

See BOND, 1. 3.

SURVEYOR.

See APPEAL, 3.

TENANTS IN COMMON.

See PARTY WALL.

TREBLE DAMAGES.

See PRACTICE, 7.

TRES-

those adjoining lands as tenants in common.

Where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, and a new wall was built of greater height than the old one, it was held that this was not such a total destruction of the wall as to entitle one of the two tenants in common to maintain trespass against the other. *Cubitt* v. *Porter*, *E.* 9 *G.* 4. Page 257

2. The stat. 8 *H.* 6. *c.* 9. *s.* 6., which gives treble damages to the party grieved by a forcible entry and expulsion, applies only to persons having the freehold; for the remedy is given against *the disseisor*. *Cole and Ux.* v. *Eagle*, *T.* 9 *G.* 4. 409

3. Trespass for mesne profits. Plea, a judgment recovered by defendant in 1822 against *A.*; an elegit sued out thereon; an inquisition held, whereby it was found that *A.*, at the time when the judgment was recovered, was seised for life of (inter alia) the premises mentioned in the declaration, and that the sheriff delivered those premises to the defendant. Replication, that in 1820, *A.* by indenture bargained and sold, inter alia, the premises mentioned

repl
held
shei
pos
tres
had
at t
was
the
deri
was
Par

Where
Atto
ter o
Row

See BA

1. In
by t
exec
of th
prob
ney
2. *A.*
sold
sessi
for t
acce
and

upon he gave them an order to sell the goods and apply the proceeds in payment of the bill. *C.* afterwards, and before the goods were sold, became bankrupt; *A.* and Co. handed over the goods to *B.* at his request, but he afterwards returned them; and after they were returned, *C.*'s assignees, having made a demand of the goods, brought trover: Held, that they could not maintain it; for that after the order given by *C.* to *A.* and Co. to sell the goods, and apply the proceeds in payment of the bill, they remained in their hands, subject to the charge, because *A.* and Co. must be presumed to have asked security as agents for *B.*, whose ratification of their act for his benefit might also be inferred. *Bailey* v. *Culverwell*, *T.* 9 *G.* 4. Page 448

3. The statute 58 *G.* 3. *c.* 75. prohibits the buying of pheasants in all cases, and therefore by a contract for the sale of live pheasants, no property passes to the purchaser. *Helps* v. *Glenister*, *M.* 9 *G.* 4. 553

TURNPIKE ROADS.

See APPEAL, 1.

VAULT.

See BURIAL.

VENDOR AND VENDEE.

A. agreed to sell to *B.* his interest in a public house, and his furniture, &c., at an appraisement to be made by two appraisers, the same to be paid for at a day fixed by the agreement, on *B.*'s taking possession, which was to be on or before the 25th of *March* then next, and 30*l.* was paid by *B.* as a deposit; and he agreed that if he should not complete his part of the agreement the sum so paid should be forfeited. The buyer and seller appointed appraisers respectively. On the 25th of *March* the two appraisers met, and the seller's appraiser was then informed that the appraiser of the buyer could not conveniently on that day complete the valuation, but would finish the business the next day. No objection was then made to the proposed delay. The appraiser of the buyer went to the seller's premises the following day to make the valuation, but the seller refused to allow him so to do, and said he would not complete the contract: Held, that under the circumstances, it was incumbent on the seller, if he intended to insist that the contract should be completed on the day mentioned in the agreement, to have notified such intention to the buyer; and, not having done so, that the latter was entitled to recover back the deposit. *Carpenter* v. *Blandford*, *M.* 9 *G.* 4. Page 575

WARRANT.

See COMMISSIONERS OF BANKRUPT.

WARRANT OF ATTORNEY.

See BANKRUPT, 4. 9. PRACTICE, 2.

WELSH JUDICATURE ACT.

By the *Welsh* judicature act, 5 *G.* 4. *c.* 106. *s.* 21. it is enacted, that in all transitory actions which shall be brought in any court of record out of the principality, and the debt or damages recovered shall

tried the cause, a judgment of nonsuit shall be entered: Held, that it is discretionary in the Judge who tries the cause, to grant or refuse the certificate mentioned in the act; and that where the Judge has refused to certify, this Court has no power to order a judgment of nonsuit to be entered.

Held, by Lord *Tenterden* C. J. at Nisi Prius, that it lies upon the defendant to shew that he was residing in *Wales* at the time when the writ or mesne process was served on him in the action, and that general evidence that his usual place of residence both before and subsequent to the commencement of the action was in *Wales* was not sufficient. *Jones* v. *Kenrick*, *T.* 9 *G.* 4. Page 337

WHARFAGE.

By an act of parliament certain persons were incorporated as the *Hull* Dock Company, and premises (before the property of the crown), were given to them for the purposes of the act, and they were authorised to make a dock,

END OF THE EIGH